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THE NEW SPECIFIC RELIEF ACT¹.

By

B. SIVARAMAYYA, *University of Delhi.*

The Specific Relief Act, (XLVII of 1963), replaced the Specific Relief Act, 1877, with effect from the 1st March, 1964. Act I of 1877 was justly regarded as an inelegant piece of legislation in the Anglo-Indian codification. The content and language of some of its provisions were subjected to severe criticism by Pollock and Mulla. Pursuant to the recommendations of the Law Commission in their Ninth Report, the new Act was passed. However, the Parliament did not adopt the recommendations of the Commission *in toto*. On two important matters, namely, the recommendations pertaining to section 9 of the old Act and on the enlargement of the scope of the declaratory decrees, the suggestions of the Commission were not adhered to.

The present Act achieves considerable reduction in size ; whereas the former Act contained 58² sections, the new one contains only 44 sections. Sections 5, 6, 27-A, 28, 32, 33, 36 and the obsolete sections dealing with orders by way of Mandamus (sections 45 to 51) under the previous Act have been omitted. In conformity with the general principle followed by the Commission all the *Illustrations* to the sections have been deleted³. Beyond this the reduction in size is only superficial for the import of sections 13 to 17, with necessary changes had been squeezed into a single section⁴ and sections 31 and 34 of the old Act have clubbed together.

Section 4 lays down that specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law. This modified language seeks to meet the criticism of Pollock and Mulla on the old provision⁵.

Recovery of immovable property.

The summary remedy in cases of forcible dispossession of immovable property (otherwise than in due course of law) had been dealt with in section 6 of the new Act. The provision under the old Act⁶ bristled with controversies, the important one being, where a person not having title to the property was dispossessed, if he could maintain a suit for recovery of possession on the strength of his anterior possession, after six months (the period of limitation prescribed in the section), or whether the section should be deemed to have barred his remedy. To take the illustration given in Pollock and Mulla⁷, A alleging that he had been in quiet and undisturbed possession of certain land for eleven years and six months and that he was forcibly ousted from possession by B, who never had any title at all, sues B, 8 months after the date of dispossession for possession. In such a case the Allahabad⁸, Madras⁹,

1. Unless otherwise stated the reference is to sections under the new Act (XLVII of 1963).

2. Inclusive of section 27-A.

3. At para. 8 of the Ninth Report of the Law Commission it was observed "We are of the view, however, that the *Illustrations* have not on the whole, served to clarify the provisions of the Act. Some of the *Illustrations* are not warranted by the terms of the relevant sections ; others have tended to prevent the development of equitable jurisprudence."

4. Section 12 of the Act (XLVII of 1963).

5. Referring to section 7 of the Specific Relief Act, 1877, Pollock & Mulla observe : "section 7 is a negative statement of the principle more clearly expressed by saying that, specific relief being a civil remedy, the plaintiff must show some individual right to it in every case....." cited in the 14th para. of the Ninth Report of the Law Commission.

6. Section 9 of the Act I of 1877.

7. Indian Contract and Specific Relief Acts, p. 753, Ed. VII.

8. *Ahmad Khan v. Ajudhia Kandu*, I.L.R. 13 All. 537.

9. *Narayan v. Dharmachar*, I.L.R. 26 Mad. 514 : 13 M.L.J. 146 ; *Narayanappa v. Hanumanthappa*, A.I.R. 1932 Mad. 32.

Bombay¹⁰, Nagpur¹¹, Lahore¹², and the Patna¹³ High Courts were of the view that his remedy to bring a fresh action was not barred. But the Calcutta High Court was of the view¹⁴ that the section operated as a bar to his bringing an action relying on his anterior possession only, after the lapse of six months. The learned Law Commissioners in their Report (Dr Sen Gupta dissenting) suggested the omission of the section stating that the section had not served its purpose¹⁵. However the Joint Committee of the Parliament did not accept this recommendation and suggested that the section be retained. It may be noted that in view of Item 64 of the Schedule of the Indian Limitation Act 1963, the view taken by the majority of High Courts, on the controversy referred to above, now prevails¹⁶.

This apart, the present enactment has done little to set at rest other controversies that emerged from the language of the section, viz (1) Does the word immovable property in the section include incorporeal rights? (2) Can a co-owner who had been ousted from joint possession sue under the Act for the possession of his share? (3) Can a landlord bring a suit if the tenant is dispossessed?

In *Fadu Jhala v. Gour Mohan Jhala*¹⁷ Petheram, C J, observed "I am of the opinion that the whole of section 9 is repugnant to the idea that immovable property in that section includes an incorporeal right such as of fishing in waters belonging to another". A contrary view was expressed by the Bombay and Madras High Courts. Sargent, C J in *Bhundal Panda v. Pandel Pos Patil*¹⁸, stated "Had it been the intention of the Legislature to exclude incorporeal rights, we might expect, that it should have been done in express terms or by confining the operation of the section to 'tangible immovable property' as done in section 145 of the Criminal Procedure Code of 1882. The Madras High Court also in *Krishna v. Akilananda*¹⁹, discussing the question whether right of ferry was immovable property, observed that there was neither special definition of immovable property nor other indication of an intention to restrict the summary remedy to tangible property.

The Calcutta High Court in *Hari Narain v. Etemjan*²⁰, and the Madras High Court in *Para Koothan v. Para Kulla Vardu*²¹, were of the view that a Court under section 9 of the Act I of 1877 had no jurisdiction to decree joint possession. The Patna High Court followed the above view in *Yellayi Sannaya v. Sannayajulu Ramesham*²². On the other hand, the Allahabad High Court in *Ballabh Das v. Gaur Das*²³ was of the view that the section did not refer to exclusive possession and that a person in joint possession, if dispossessed, could maintain a suit. The Nagpur²⁴, the Lahore²⁵ and the Rajasthan²⁶ High Courts held the latter view.

10 *Prem Raj v. Narain Shira* I L.R. 6 Bom 215 (F.B.)

11 *Perraisal v. Biaya Lal*, A.I.R. 1937 Mad 281

12 *Daya Prakash v. Bhana Mal* A.I.R. 1936 Lah 241

13 *Shiv Saran v. Sukdeo Rao*, A.I.R. 1937 Pat 418

14 *Ala Chand v. Fanehiram* I L.R. 26 Cal 579

15 See para 16 of the Ninth Report of the Law Commission—hereinafter cited as Report

15a Under Item 64 of the Schedule of the Indian Limitation Act, 1963 a period of twelve years had been prescribed as limitation. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property had been dispossessed.

16 I L.R. 19 Cal 544 (F.B.) at p. 547

17 I L.R. 12 Bom 221 at 224

18 I L.R. 13 Mad 51

19 (1914) 19 C.W.N. 420

20 (1916) 29 M.L.J. 760

21 A.I.R. 1940 Pat 193

22 A.I.R. 1940 All 261

23 A.I.R. 1922 Nag 115

24 A.I.R. 104 P.R. 1919

25 1961 Raj L.W. 636

On the third question in *Ratan Lal v. Amar Singh*²⁶, Kemp, Ag. C.J., was of the view that possession in the section was not confined to actual physical possession. It was held that the landlord if he desired to sue immediately, he could sue in the name of the tenant and in his own name in case of an injury to the reversion. But the Madras High Court in *Veeraswami Mudali v. Venkatachala Mudali*²⁷ after a review of cases and following the Full Bench decision of the Allahabad High Court in *Sita Ram v. Ram Lal*²⁸, held that when the tenant in possession was evicted the landlord could not maintain a suit as he (the landlord) was not entitled to actual possession. The Allahabad High Court in *Jadunath Singh v. Bisunath Singh*²⁹, the Patna High Court in *Seilesh Kumar v. Rama Devi*³⁰, the Pepsu High Court in *Govind Ram v. Mt. Mewa*³¹, held that the landlord could maintain a suit, where the tenant had been dispossessed. The decision in *Sita Ram v. Ram Lal*³², was distinguished on the narrow ground that it was not a case under the Specific Relief Act.

Specific Delivery of Movable Property.

Under the Specific Relief Act, a remedy by way of specific delivery of movable property could be obtained by a person entitled to immediate possession as against a person holding possession not as an owner in the following instances : (1) Where the defendant holds the article as the agent or trustee of the claimant ; (2) Where compensation in money would not afford the claimant adequate relief for the loss of the thing claimed ; (3) When it would be extremely difficult to ascertain the actual damage caused by its loss ; (4) When the possession of the thing had been wrongfully transferred from the claimant³³.

In one direction the new provision is an improvement over the former provision. It may be recalled that a Full Bench of the Madras High Court in *Venkatasubba Rao v. The Asiatic Steam Navigation Co.*³⁴, held that it was necessary for the plaintiff to allege and prove the circumstances which entitle him to the specific delivery of property under section 11 of the Act I of 1877. Pollock and Mulla took exception to the view. Under section 8 of the new Act, in cases (1) and (4) above the burden would be on the plaintiff to establish the fiduciary relationship and the wrongful transfer of possession, whereas in cases falling under (2) and (3) it would be for the defendant to establish that a particular article is an ordinary article of commerce or that damages are ascertainable.

Specific Performance.

Under the former Act³⁵, specific performance may in the discretion of the Court be enforced "when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done." This clause was omitted as being inconsistent with the basic principles of the Court of Equity³⁶. A striking feature of section 10 of the present Act dealing with contracts which can be enforced specifically is that it provides two exceptions to the general principles that a contract to transfer movable property can be relieved by damages. The first is where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff or consists of goods which are not easily obtainable in the market, and secondly, where property is held by the defendant as an agent or trustee of the plaintiff.

26. A.I.R. 1929 Bom. 467.

27. 50 M.L.J. 102 : A.I.R. 1926 Mad. 8.

28. (1896) I.L.R. 18 All. 440 (F.B.).

29. (1950) All L.J. 288.

30. A.I.R. 1952 Pat. 339.

31. A.I.R. 1953 Pepsu 189.

32. I.L.R. 18 All. 440 (F.B.).

33. Section 8 of the Specific Relief Act, 1963, corresponding to section 11 of the Specific Relief Act, 1877.

34. (1916) I.L.R. 39 Mad. 1 : 29 M.L.J. 342 (F.B.).

35. Section 12 Cl. (d) of the Act I of 1877.

36. See para. 22 of the Report.

Specific Performance of a Part of a Contract

Section 12 of the present Act deals with specific performance of a part of a contract. One of the unsatisfactory features of the old Act related to the position where a person was unable to perform the whole of the contract and the part that could not be performed (a) formed a considerable part of the whole, or (b) did not admit of compensation in money. In such cases the non-defaulting party was entitled to enforce the contract, if only he relinquished all further claims for compensation. Thus if A contracted to sell hundred bighas of land to B but was in a position to convey only fifty bighas, B was entitled to specific performance only if he relinquished all claims for further compensation. In cases falling under clause (a) above it is inequitable to deny compensation for the part that cannot be performed. Section 12 now provides for compensation in such cases. Where the part that cannot be performed does not permit of compensation, no question of abatement of consideration arises.

The rights of purchasers and lessees of immovable property with defective title have been dealt with in section 13. A conspicuous feature of the amended law is that these remedies are available not only in cases of defective title but also in cases of total absence of title. The scope of these provisions has been extended to sale and hire of movable properties *mutatis mutandis*³⁷. Keeping in view the observations of Das, J, in *Dalmia & Co. v. L. Works*³⁸, it has been made clear that section 13 (a) is applicable only to executory contracts.

Section 14 of the Act dealing with contracts which will not be enforced specifically reflects considerable change. Pollock and Mulla criticised the former provision³⁹ on the ground that the section and *Illustrations* "do not more clearly distinguish cases where there is a contract binding in law and enforceable, only not by specific performance, from those where there is no contract at all". The present section obviates this criticism. The other changes in the section are (a) a contract the performance of which involves the performance of continuous duty *which the Court cannot supervise*⁴⁰, will not be enforced specifically. It may be recalled that previously a contract for the performance of a continuous duty extending over a longer period than three years was not enforceable specifically. (b) Specific exception has been provided to the general rule that a contract to lend money or execute a mortgage will not be enforced specifically⁴¹. Also contracts to take up and pay for debentures of a company⁴², and suits for execution of a formal deed of partnership (the parties having commenced the business)⁴³, and the purchase of a share of a partner in a firm⁴⁴ have been rendered specifically enforceable. (c) Contracts for construction of any building or the execution of any work on land are enforceable specifically subject to the fulfilment of certain conditions⁴⁵.

The provision relating to discretion in enforcing specific performance, that is section 20, clarifies the law as it stood before. The ambit of the term "unfair advantage" have been clearly delineated. It has been made explicit that "unfair advantage" need not necessarily be of such a nature as to render the contract voidable. The *Explanation* to the section states that mere inadequacy of consideration, or the mere fact that the contract is onerous or improvident will not be deemed to constitute "unfair advantage" or "hardship" within the meaning of the clause.

37 Section 13 (2) of the Specific Relief Act, 1963

38 A.I.R. 1952 Pat 392 at 409

39 Section 21 of the Specific Relief Act 1877

40 Pollock and Mulla, *Indian Contract and Specific Relief Act*, p 790, Ed 8

41 Emphasis added

42 Section 13 (a) (1) of the Specific Relief Act, 1963

43 Section 13 (a) (2) of the Specific Relief Act 1963

44 Section 13 (b) (1) of the Specific Relief Act, 1963

45 Section 13 (b) (2) of the Specific Relief Act, 1963,

46 Section 13 (c) of the Specific Relief Act, 1963

Further it has been laid down that "hardship on the defendant" will have to be determined with reference to circumstances existing at the time of the contract.⁴⁷

Mutuality.

Want of mutuality as a defence in a suit for specific performance, formerly, gave rise to much divergence of judicial opinion. Witley Stokes in his *Anglo-Indian Codes* was of the view that the defence was not available under Indian Law in a suit for specific performance.⁴⁸ However, the observations of the Privy Council in *Mir Sarwarjan v. Fakhruddin*⁴⁹, pointed out a different conclusion. There the guardian of a minor entered into a contract for the purchase of immovable property. The suit was instituted for the specific performance of the contract against the vendor. Their Lordships were of the view that it was not within the power of the guardian to enter into the contract and proceeded to state: "they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract."⁵⁰

The above observation of their Lordships marks the foundation of the doctrine in India. By a long catena of decisions the doctrine had been applied even to contracts for sale of immovable property by the guardians. But the Privy Council in *Subramanyam v. Subbarao*⁵¹, upheld a contract of sale executed by a guardian of a minor (for the purpose of discharging debts binding on the minor) and allowed the defence of part performance set up by the buyer. After this decision the Indian Courts differed widely in their views as to the applicability and the extent of applicability of the doctrine of mutuality to contracts for sale of immoveable property entered into by guardians of minors⁵². These controversies have now been set at rest and mutuality is no longer a defence in suit for specific performance. Section 20 (4) lays down: "The Court shall not refuse to any party specific performance of the contract merely on the ground that the contract is not enforceable at the instance of the other party".⁵³

Personal bars to the grant of specific relief have been modified in the light of decided cases. In *Shish v. Banamali*⁵⁴ upholding the dismissal of a suit for specific performance of a compromise the Privy Council stated: "The conduct of Krishna was at variance with and amounted to a subversion of, the relation intended to be established by the compromise." The wording of section 16 (b) incorporates this principle substantially⁵⁵. In consonance with the decision of the Privy Council in *Ardeshir H. Mama v. Flora Sasson*⁵⁶, it has been now expressly stated that the plaintiff should aver and prove that he is ready and willing to perform the contract; otherwise he is not entitled to specific performance. Where the parties are at variance as to the consideration in a contract for sale, what should be the nature of the pleading? Formerly on this question the High Courts differed. Following the view taken by the Madras High Court, it has now been laid down in *Explanation (2) to clause (c) of section 16*:⁵⁸ "The plaintiff must aver performance of, or readiness and willingness to perform the contract according to its true construction".

47. *Explanation 2 to section 20 of the Specific Relief Act, 1963.*

48. *Anglo-Indian Codes*, Vol. 1, p. 939.

49. L.R. 39 I.A. 1 : 21 M.L.J. 1156.

50. *Ibid* at p. 6.

51. L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 : (1948) 2 M.L.J. 22. : A.I.R. 1948 P.C. 95.

52. For a detailed discussion of the topic see Prof. G.C.V. Subba Rao's *Principles of Equity*, p. 515, Ed. 1.

53. Section 20 (4) of the Specific Relief Act, 1963.

54. 31 Cal. 584.

55. Section 16 (b) of the Specific Relief Act, 1963.

56. L.R. 56 I.A. 360.

57. See Para. 61 of the Report.

58. Section 16 Cl. (c), *Explanation (2) of the Specific Relief Act, 1963.*

Section 22 of the Act which has been newly introduced, has also a bearing on the law of pleadings. Under this section any person suing for specific performance may ask for (a) possession, or partition and separate possession of property in addition to specific performance (b) any other relief to which he may be entitled including the refund of any earnest money or deposit in case his claim for specific performance is refused. But such relief should be specifically claimed and it is open to the Court at any stage of the proceeding, to allow the amendment of the plaint.

Declaratory Decrees

The absence of any change in the law relating to declaratory decrees constitutes an unsatisfactory feature of the revision of the Act. On this important aspect of specific relief Parliament did not implement the recommendation of the Law Commission. Modern Legal systems reflect an awareness to exploit the potentialities of declaratory relief. Lord Denning observed⁵⁹ "Just as pick and shovel is no longer suitable for the winning of coal, so also the procedure of *mandamus*, *certiorari* and actions on the case are not suitable for winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions, and actions for negligence." Dr. Zamir in his learned work⁶⁰ points out the following advantages of declaratory judgment over *certiorari* and prohibition.

- (1) Declaratory relief may be granted in respect of judicial as well as non-judicial decisions,
- (2) It is available against statutory as well as non-statutory bodies,
- (3) It may issue in respect of judgments of superior Courts,
- (4) It may be utilized to remove doubts as to the validity or meaning of a decision,
- (5) It may be used so as to substitute the decision of the High Court for that of a tribunal,
- (6) It can be granted in combination with some other relief,
- (7) It is comparatively free from procedural technicalities.

The Law Commission too in its Report envisaged the extension of the scope of the declaratory relief. The important recommendations were⁶¹

- (1) The deletion of the proviso to section 42 of the Specific Relief Act, 1877, but making the provision subject to Order 11, rule 2, of the Civil Procedure Code,
- (2) To omit the words "as to any property" occurring in the section. Such alteration enables the grant of relief in cases of pecuniary and contractual rights,
- (3) To extend the scope of the relief to declarations as to the unconstitutionality of the statutes.

It is to be regretted that the Parliament, while rejecting the suggestion to enlarge the scope of the remedy, did not even consider fit to clarify and revise the provision in its existing ambit. Thus there is a serious divergence of opinion between the Madras⁶² and Allahabad High Courts⁶³ on the one hand and other High Courts⁶⁴ on the other hand, whether the provision is exhaustive as to the circumstances under which declaratory relief could be granted in India. Also the re-

⁵⁹ Freedom Under the Law p. 126 Ed. 1

⁶⁰ Declaratory judgment pp. 166 to 172

⁶¹ Paras 32 to 34 of the Ninth Report of the Law Commission

⁶² *Ramachandra v. S.O.S.*, 1 I.L.R. 39 Mad. 808, *Ramakrishna v. Narayana* 1 I.L.R. 39 Mad. 80, *Andhra University v. Durga Lakshmi*, (1951) 1 M.L.J. 518 A.I.R. 1951 Mad. 870

⁶³ Allahabad High Court in *Mid. Hassan v. Gajadhar*, A.I.R. 1937 All. 585, *Sri Krishna v. Mahabir*, A.I.R. 1933 All. 483

⁶⁴ *Kulkarni Lal v. Beg Roy*, A.I.R. 1952 Punj. 587, *Narayana Prasad v. Indian Iron & Steel Co.*, A.I.R. 1953 Cal. 695 Also 54 Bom. 676

quirements of further relief under the Proviso to the section gives rise to considerable litigation. The Legislature did not even seem to have adverted to the observation of Pollock and Mulla:⁶⁵ "The persistent though mostly futile attempts to evade the important Proviso to section 42, for the purpose of obtaining in effect the benefit of substantive decree without paying the proper Court-fee for it, seem to point out to a need for more explicit and stringent wording".

Minors' Contracts.

Section 33 of the Act lays down the equitable principle which empowers the Court, on adjudging the cancellation of an instrument, to order the party to whom the relief is granted to restore the property, as far as may be, and to make compensation to the other party. Formerly the question arose in an acute form; where a minor defendant fraudulently represents that he is a major, and enters into a contract; and subsequently seeks to avoid the contract; can he be asked to repay the benefit he had received under a void contract? A Full Bench of the Lahore High Court in *Khan Gul v. Lakha Singh*⁶⁶, held that it was open to a Court to restore the *status quo ante* between the parties, and the minor defendant could be required to return the benefit under the contract. It was further held that the principle laid down by Lord Sumner in *Leslie v. Sheil*⁶⁷ "restitution stops where repayment begins" was inapplicable in India as the word "compensation" occurring in section 41 of the Specific Relief Act, 1877, was wider than restitution. On the other hand the Allahabad High Court in *Ajudhia Prasad v. Chandan Lal*⁶⁸, was of the view that it was not open to a Court to grant a relief other than restitution, like the passing of a money decree, as it would "tantamount to enforcing the minor's pecuniary liability under a void contract". This view was shared by the Nagpur High Court also in *Tikki Lal v. Kowalchan*⁶⁹, and the Andhra High Court in *Latharao v. Bhimayya*⁷⁰. Pollock and Mulla preferred the view taken by the Lahore High Court.⁷¹ It has now been made clear under section 33 (2) (b) that where a defendant sets up minority or insanity as defence, the Court may require him to restore, so far as may be, the benefit he or his estate has received.

Injunctions.

Barring alterations of a minor character the law relating to injunctions stands as before. On the question of enforcement of negative covenants in contracts of service by means of injunctions, the Law Commission adopted an orthodox approach.

It may be recalled that in *Lumley v. Wagner*⁷², Miss Wagner agreed that she would sing in Lumley's theatre for a certain period and that she would not sing anywhere else during that period. After a quarrel with Lumley she refused to sing in Lumley's theatre and stated that she would sing in Gye's theatre. The Court held that although it would not enforce the affirmative part of the contract, it would issue an injunction to prevent the breach of negative stipulation. It was further stated that even in the absence of an express negative stipulation the Court would infer one.

Stevens⁷³ pointed out the following objections to the doctrine: (1) The impossibility of continual supervision by the Court; (2) The invidiousness of keeping persons tied to each other in business relations when the tie has become odious; (3) The undesirability of turning a contract of service into a servitude. Justice Holmes in *Rice v. D'Arville*⁷⁴, said that he failed to understand why, "if equitable

65. Indian Contract and Specific Relief Acts, p. 737, Ed., VIII.

66. A.I.R. 1928 Lahore 60.

67. (1914) 3 K.B. 607.

68. A.I.R. 1937 All. 608.

69. 1940 Nag. 632.

70. (1956) An.W.R. 535 : A.I.R. 1956 Andhra 182 at 187.

71. Indian Contract and Specific Relief Acts, p. 77, Ed. VIII.

72. 42 E.R. 687.

73. 6 *Cornell Law Quarterly*, 244. Cited in Hanbury's *Modern Equity*, p. 571, Ed. VIII.

74. Mass. Suffolk Equity Session, September 29, 1894. Cited in 8 *Harvard Law Review*, p. 172.

remedy could be given for the purpose of making an artist to keep his contract, the usual remedy should not be given and the whole of it"

In a subsequent decision of the Court of Appeal in *Whitwood Chemical Company v. Hardman*⁷⁵ Lindley, L. J., expressed the view that *Lumley v. Wagner*⁷⁶ was an "anomaly" and it would be very dangerous to extend it

Despite these weighty objections the Law Commission preferred the continuance of the doctrine in *Lumley v. Wagner*⁷⁶. A more satisfactory conclusion would have been arrived at if the Commission approached the problem from sociological perspective whether it resulted in the retention or rejection of the doctrine. Perhaps in many situations the "white collared" workers and the professional artistes will feel the brunt of the doctrine. When the sanctity of a contract had been given the go-by in the Indian law in many cases an adherence to it in contracts relating to personal service fails to convince.

In sum it may be said that despite many improvements in substance and in detail achieved by the new Act it is unsatisfactory in three respects *viz*, the possessory remedy in relation to immovable property, declaratory decrees and the enforcement of a contract for personal service by an injunction

75 L.R. (1891) 2 Ch. 416 at 428.

76 42 E.R. 687

THE SUPREME COURT OF INDIA.

PRESENT:—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Madras

.. Appellant*

v.

The Kumbakonam Mutual Benefit Fund, Ltd.

.. Respondent.

Income-tax Act (XI of 1922), sections 3, 10, 66—Income—Mutuality—Benefit Fund—Deposits—and loans restricted to members—Membership not restricted to depositors or borrowers—Participation of all members in Fund's surplus receipts—Surplus, whether taxable income.

Practice—High Court—Costs of Reference—Institution fee deposited by assessee—Refund, whether, can be ordered.

A Mutual Benefit Fund, incorporated under the Companies Act of 1882, limited by shares, carried on business in banking restricted to its shareholders. Recurring deposits were obtained from members and returned with interest. Loans were advanced to members only. Out of the interest realized by the Fund on the loans which constitute the main income, interest on the recurring deposits are paid, and also the other outgoings and expenses of management, and the balance is divided among the members *pro rata* according to their share-holdings after making provision for reserves etc. The shareholders who are entitled to participate in the profits need not have either taken loans or have made recurring deposits. The Income-tax Officer held that the entire surplus of the Fund was assessable as that of a banking concern under section 10 of the Income-tax Act. This was confirmed by the Appellate Assistant Commissioner and the Tribunal in appeal. The High Court, on Reference, applied *Style's Case* (1889) L.R. 14 A.C. 381, and held that the income was not assessable. On appeal under a certificate of fitness,

Held : The essence of mutuality lies in the return of what one has contributed to a common fund. All the contributors to a common fund must be entitled to participate in the surplus and all the participants in the surplus must be contributors to the common fund ; in other words there must be complete identity between the contributors and the participants. The profits of such an association will not be assessable to tax. But if profits are distributed to shareholders as shareholders the principle of mutuality is not satisfied.

A shareholder in the assessee company is entitled to participate in the profits without contributing to the funds of the company by taking loans. He is entitled to receive his dividend as long as he holds a share. He has not to fulfil any other condition. His position is no way different from a shareholder in a banking company, limited by shares. Indeed the position of the assessee is not different from an ordinary bank except that it lends money to and receives deposits from its shareholders. This does not by itself make its income any the less income from business within section 10 of the Act.

The High Court has no power to direct a refund of the institution fee deposited in the Reference. But the High Court can, if they so deem fit in a particular case, assess the costs in such a manner as to include the sum of Rs. 100 deposited as Reference fee.

Appeals from the Judgment and Order dated 20th October, 1960 of the Madras High Court in Case Referred No. 78 of 1956.

K. N. Rajagopal Sastri, Senior Advocate (R. N. Sachthey, Advocate, with him), for Appellant.

R. Kesava Iyengar, Senior Advocate (M. S. K. Iyengar and Krishna Pillai, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—The respondent, the Kumbakonam Mutual Benefit Fund Ltd., hereinafter referred to as the assessee, is a company incorporated under the Indian Companies Act, 1882, limited by shares. Since 1938, the nominal capital of the assessee is Rs. 33,00,000 divided into shares of Re. 1 each. It carries on banking business restricted to its shareholders, *i.e.*, the shareholders are entitled to participate in the various recurring deposit schemes of the assessee or to obtain loans on security. The Statement of the Case describes the working of the assessee thus:

“Recurring deposits are obtained from members for fixed amounts to be contributed monthly by them for a fixed number of months as stipulated at the end of which a fixed amount is returned to them according to published tables. The amount so returned will cover the compound interest of the period. These recurring deposits constitute the main source of funds of the assessee for advancing loans. Such loans are restricted only to members who have, however, to offer substantial security, therefore, by way of either the paid-up value of their recurring deposits, if any, or immovable properties, within the Tanjore District.

Out of the interest realised by the assessee on the loans which constitute its main income interest on the recurring deposits aforesaid are paid as also all the other outgoings and expenses of management and the balance is divided among the members *pro rata* according to their shareholdings after making provision for reserves, etc., as required by the Memorandum of Articles aforesaid. The shareholders who are thus entitled to participate in the profits need not have either taken loans or have made recurring deposits."

The Income-tax Officer assessed the entire profits for eight years from 1946-47 to 1953-54. In a detailed and closely reasoned order, dated 29th February, 1952, which is part of the Statement of the Case, passed in respect of the assessment year 1947-48, the Income tax Officer held that *New York Life Assurance Company v. Styles*¹, did not apply to the facts of this case. He distinguished *Styles Case*¹ thus:

"Whereas the New York Life Assurance Company paid to its members what it had saved, the assessee fund pays to its members what it has earned. A shareholder in the New York Life Assurance Company did not get back anything more than what he contributed, a shareholder of the Kumbakonam Mutual Benefit Fund does on the other hand get more than what he contributes. A fixed depositor gets back on maturity of the deposit not only the amount he deposited but also the interest thereon. A recurring depositor who pays, say a rupee each month for eighty-six months does not get back Rs. 86 only, or something less, but Rs. 100, the balance of Rs. 14 representing the interest on his deposit. What is returned to him is not a mere refund and there is no question here, as in the case of the New York Life Assurance Company, of his contributing money for a common purpose and getting back that much of his contribution as is not required for the common purpose. From the point of view of the individual member, an investment in the assessee fund is just like any other lucrative investment and his primary object in investing his money with the fund is the income which comes to him in the guise of interest or dividend."

Relying on Rowlatt, J's, observations in *Thomas v. Richard Evans Co., Ltd.*² that 'it does not come back to them as purchasers, or customers, it comes back to them as shareholders upon their shares'

the Income-tax Officer held that

"the profits made by the fund belong to them as shareholders and not as borrowers from the fund or in the capacity of individuals who have in any way utilised the facilities afforded by the Fund."

He further held that

"there should firstly be a common fund and then it must be proved that the contributors to this common fund and the participants in the surplus are one and the same. As far as I can see, there is no common fund in this case. The income of the assessee is derived from interest on loans lent to its members, interest on Government securities, rents from property, etc., and it is distributed to the members either in the shape of guaranteed interest or dividends or both. As far as the allegedly "mutual" transactions of the assessee are concerned, the contributors to the income of the company are those members who have borrowed from the assessee and paid interest on their borrowings. If the requirement of the complete identity between contributors and participants were to be satisfied, then the above contributors should also be entitled to participate in the profits."

He further pointed out that a shareholder may not hold any deposit with the fund and may not utilise the borrowing facilities afforded by the fund but may be content to receive such dividend as is declared.

The Appellate Assistant Commissioner, on appeal, upheld the order of the Income-tax Officer. It was urged before him, *inter alia* that the decision in the case of *Board of Revenue, Madras v. The Myslapore Hindu Permanent Fund Ltd.*³, applied to the facts, because the capital was also fluctuating in this case. He however held that it was not a case of fluctuating capital but only a steady increase of capital. He further held that a shareholder need not be a subscriber to the fixed or recurring deposits, and a shareholder may not participate in the interest earning if no dividend is declared.

On further appeal, the Income-tax Appellate Tribunal held as follows.

"The fund's claim that it is in reality a mutual benefit society is untenable. The cardinal requirement is that all the contributors to the common fund must be able to participate in the surplus and that all the participants in the surplus must be contributors to the common fund. In other words, complete identity between the contributors and the participants is essential."

Firstly there is no common fund. Secondly, the shareholders may or may not receive a dividend. But those shareholders who contribute to the recurring deposits of various duration

¹—(1899) 14 A. C. 381-2 T.C. 470 (H.L.)
2. L.R. (1927) I K.B. 33 II T.C. 790

³—(1924) I.L.R. 47 Mad. 1

receive guaranteed interest. The persons who contribute to the income of the company are these shareholders who borrow from the appellant and pay interest on their borrowings. Out of the income so derived, the guaranteed interest to the shareholders who make monthly deposits, receive guaranteed interest but the shareholders who do not contribute monthly deposits may or may not receive any dividend. Thus, the complete identity between contributors and participators does not exist. The nature of the business of the appellant is that of ordinary banking though the business is restricted to its members or shareholders only. This restriction does not in the least take the income of the appellant out of the purview of the charging sections of the Act. In our opinion, the Income-tax authorities were right in treating the appellant as a banking concern."

The Appellate Tribunal, however, stated a consolidated case in respect of the assessment years, 1946-47 to 1953-54, and referred the following questions to the High Court :

"(1) Whether there were materials for the Tribunal to hold that the assessee is a banking concern assessable, under section 10 for all the assessment years and not exempt.

(2) If the answer to the above question is in the affirmative and against the assessee, whether the payments to the non-recognised provident fund by the assessee for the six years of assessment 1946-47 and 1948-49 to 1952-53 are allowable deductions under any provisions of the Act."

We are here only concerned with Question No. 1. The High Court, for reasons which will be shortly stated, answered, the question in the negative, and awarded costs Rs. 250. It further ordered the refund to the assessee of the institution fee of Rs. 100 for each of the References "as part of the costs to which as successful assessee it will be entitled to."

The High Court, after a review of the cases cited before it, came to the conclusion that the assessee satisfied the conditions necessary for the applicability of *Style's case*¹. According to it, the facts that the benefits of the association are available only to members thereof and no non-member can participate in the benefits, and that the profits that arise from this mutual trading are the result of the interest collected from members who take advantage of the loans offered by the Fund and also of the default interest paid by members who delay payment of recurring deposits, and that the 'profit' after payment of interest to depositors and after meeting the other expenses of administration of the fund are available for distribution among the entire body of the members, showed that there was complete mutuality. It held that :

"what is accordingly required is that both the right to contribute and the right to participate must be available to an identical body and it is not necessary that every member should contribute before he can be allowed to participate. That this test is also satisfied in the present case is beyond question."

It is this test which is attacked as unsound by the learned Counsel for the appellant.

The High Court certified the cases as being fit for appeal to this Court, under section 66-A (2) of the Indian Income-tax Act, and the appeals are now before us for disposal.

The question that arises in this case is whether the *Styles case*¹ covers the facts of this case. In other words, to use the language of Lord Macmillan in *Municipal Mutual Insurance Ltd. v. Hills*², has the cardinal requirement, namely, that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund ; in other words, there must be complete identity between the contributors and the participators been satisfied ?

Most of the cases, both English and Indian, bearing on the point under discussion, were reviewed by this Court in *Commissioner of Income-tax v. Royal Western India Turf Club Ltd.*³, and this relieves us of the task of reviewing all of them again. We will, however, shortly deal with those in which companies limited by shares were concerned, for they stand on a slightly different footing from companies limited by guarantee.

Although the facts in the *Royal Western India Turf Club Case*³ were different, this Court laid down the following :

1. (1889) L. R. 14 A.C. 381; 2 T.C. 460.
2. 16 T.C. 430.

3. (1953) S.C.J. 739 : (1953) 2 M.L.J. 828 :
(1954) S.C.R. 289.

"The principle that no one can make a profit out of himself is true enough, but may in its application easily lead to confusion. There is nothing *per se* to prevent a company from making a profit out of its own members. Thus a railway company which earns profits by carrying passengers may also make a profit by carrying its shareholders or a trading company may make a profit out of its trading with its members besides the profit it makes from the general public which deals with it but that profit belongs to the members as shareholders and does not come back to them as persons who had contributed them. Where a company collects money from the members and applies it for their benefit not as shareholders but as persons who put up the fund the company makes no profit. In such cases where there is identity in the character of those who contribute and of those who participate in the surplus, the fact of incorporation may be immaterial and the incorporated company may well be regarded as a mere instrument, a convenient agent for carrying out what the members might more laboriously do for themselves. But it cannot be said that incorporation which brings into being a legal entity separate from its constituent members is to be disregarded always and that the legal entity can never make a profit out of its own members."

In *Dibrugarh District Club, Ltd v The Commissioner of Income-tax, Assam*¹, which was noticed by this Court, the Calcutta High Court distinguishing *Styles' case*² held that the fact of incorporation could not be neglected on the facts of the case. In that club, out of the members of the club only 69 were shareholders and 220 were non-shareholders, while 74 out of 445 of the shares were held by non members of the club, and the profits of the club were being distributed every year as dividend to shareholders.

Rowlatt, J., in our opinion, correctly points out that if profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. In *Thomas v Richard Evans & Co*³, he observes thus:

"But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders—even if it is limited to trading with them—makes a profit, that profit belongs to the shareholders in a sense, but it belongs to them *qua* shareholders. It does not come back to them as purchasers or customers. It comes back to them as shareholders upon their shares. Where all that a company does is to collect money from a certain number of people—it does not matter whether they are called members of the company, or participating policy holders—and apply it for the benefit of those same people not as shareholders in the company but as the people who subscribed it, then as I understand the *New York case*⁴, there is no profit. If the people were to do the thing for themselves there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profit. This is not because the entity of the company is to be disregarded: it is because there is no profit. The money being simply collected from those people and handed back to them, not in the character of shareholders but in the character of those who have paid it. That, as I understand it, is the effect of the decision in the *New York case*⁵."

It seems to us that the test applied by the High Court is not sound. It is not consistent with the true decision in *Styles' case*² as understood by this Court and in other subsequent cases. It will be noticed that Lord Macmillan clearly said that all participants must be contributors to the common fund and not that all participants must be entitled to contribute. The essence of mutuality lies in the return of what one has contributed to a common fund.

Das, J., as he then was, in the passage quoted above, in *Commissioner of Income tax v Royal Western India Turf Club, Ltd*⁶, reiterated the same idea.

The learned Counsel for the assessee, relying on *The National Association of Local Government Officers v Watkins*⁷, urged that it is not necessary that all must contribute to the common fund. But in that case it was an unincorporated association and Finlay, J., regarded that as a matter of fundamental importance, for it followed from it, as held by Finlay, J., that

"the property belongs to the members and it is a fallacy, as had been pointed out in several cases one at least of which was cited to me to say in the case of such a club that, where a member orders a dinner and consumes it, there is any sale to him. There is not a sale. The fundamental thing is that the whole property is vested in the members."

He emphasizes this again when he says that :

1 I.L.R. 55 Cal. 571 A.I.R. 1928 Cal. 577 pages 822-823
2 (1879) L.R. 14 A.C. 381, 2 T.C. 4 (1953) S.C.J. 739 : (1953) 2 M.L.J.
460 (P.L.L.) 828 : (1954) S.C.R. 257
3 L.R. (1927) 1 K.B. 31 11 T.C. 790 at 5 (1934) 18 T.C. 499.

“it may be that where you have a separate entity, where you have a company, in a great many cases the test is that you have to look at the subscribers, look at the participants, and see if they are the same. Here it seems to me lie at the root of the thing that the property was not the property of the Association; it was the property of the members themselves.....”

It is this feature of the case which Chagla, C.J., failed to notice in *Ismailia Grain Merchants' Association v. Commissioner of Income-tax*¹.

We may now deal with the cases decided by the Madras High Court, and relied on by the learned Counsel for the assessee. In *Bourd of Revenue v. The Mylapore Hindu Permanent Fund, Ltd.*², the Fund was registered under the Indian Companies Act of 1866. A shareholder subscribed one rupee per share per mensem and at the end of 7 years drew Rs. 102-8-0, and then he ceased to be shareholder (*qua* the share). A shareholder had to pay interest on the subscription, if not paid within the time prescribed by the Rules. Apart from the interest on the subscription, the Fund derived income from interest on loans given exclusively to its members, every one of them being entitled under the Rules to take loan, and occasionally from interest from outside investments with bank. The High Court held the *Styles' case*³ applied and also held that the income earned by the Fund by way of interest from its own members was not taxable under the Income-tax Act, 1918, in spite of the fact that such profits were divided among directors and distributed among the shareholders with reference to the number of shares and the number of months during which they had held them. But the point urged by Mr. Rajagopal Sastri was not raised before the High Court and the High Court was content to apply the test “whether the income comes in from outside and not from within”. But as held by the Full Bench in *The Madura Hindu Permanent Fund, Ltd. v. The Commissioner of Income-tax*⁴, this case could not have been rightly based on *Styles' case*.³

In *The Sivaganga Sri Meenakshi Swadeshi Saswatha Nidhi, Ltd. v. The Commissioner of Income-tax*⁵, the High Court, without adverting to doubts expressed in the decision in *Madura Hindu Permanent Fund, Ltd.*⁴ regarding the applicability of *Styles' case*³, which was referred to in the Statement of the Case, and without giving any reasons, held that the *Mylapore Hindu Permanent Fund case*² applied.

In *Tanjore Permanent Fund v. Commissioner of Income-tax*⁶, the High Court held that there was no conflict between the decision in *Mylapore Hindu Permanent Fund case*² and the *Madura Hindu Permanent Fund case*⁴. As the facts in the case were similar to that in *Mylapore Hindu Permanent Fund case*², the High Court refused to re-open the question and disturb the practice, but however added that,

“though the term ‘shareholder’ has been here used, we do not wish to be understood as deciding that these subscribers are shareholders properly so called within the meaning of the Companies Act.”

As already pointed out, in none of these cases the point was debated as to what is the position when shareholders participate in profits as shareholders and not as contributors.

It seems to us that it is difficult to hold that *Styles' case*,³ applies to the facts of the case. A shareholder in the assessee company is entitled to participate in the profits without contributing to the funds of the company by taking loans. He is entitled to receive his dividend as long as he holds a share. He has not to fulfil any other condition. His position is in no way different from a shareholder in a banking company, limited by shares. Indeed, the position of the assessee is no different from an ordinary bank except that it lends money to and receives deposits from its shareholders. This does not by itself make its income any the less income from business within section 10 of the Indian Income-tax Act.

In our opinion, the answer to the question referred to the High Court should be in the affirmative. The appeals are accordingly accepted, but in view of the fact that the *Mylapore Fund case*² has held the field in Madras since 1923, we do not

1. (1957) 59 Bom. L.R. 521: 31 I.T.R. 433: (H.L.).
A.I.R. 1958 Bom. 32.
2. (1924) I.L.R. 47 Mad. 1.
3. (1889) L.R. 14 A.C. 381: 2 T.C. 460
4. 6 I.T.C. 326.
5. 8 I.T.C. 83.
6. (1937) 5 I.T.R. 160: A.I.R. 1938 Mad. 57.

wish to burden the assessee with costs Accordingly, the parties will bear their own costs throughout

A subsidiary point was raised by Mr Sastri that the High Court had no jurisdiction to order the refund of the Reference fees deposited by the assessee This is true But the High Court can if they so deem fit in a particular case, assess the costs in such a way as to include the sum of Rs 100 deposited as Reference fee

V S

Appeal allowed

THE SUPREME COURT OF INDIA

PRESENT —K. SUBBA RAO, J C SHAH AND SIKRI, JJ.

The Commissioner of Income-tax, Madras

Appellant*

A Gajapathy Naidu, Madras

Respondent

Income tax Act (VI of 1972) section 4 (1) (b) (i)—Accrue or arise—Contract—Money due under—Right to—When arises or accrues—Terms of contract—Assessee, contractor adopting mercantile system of accounting—Loss sustained under contract in prior year of account—Receipt of compensation therefor in later year of account—Income arises in the year of account or payment—No relation back to year of contract—No principle of reopening of accounts of prior year applicable

During the financial year 1st April 1948 to 31st March 1949 the assessee supplied bread to a Government Hospital under a contract The assessee maintained the accounts on the mercantile basis The amounts due from the Government under the contract was credited in the accounts for that year and was so assessed for the assessment year 1949-50 The Government on the representation that the assessee had sustained a loss in respect of the contract for the year 1948-49, paid him compensation of Rs 12,447 in the year of account 1950-51 The Income-tax Officer in the assessment year 1951-52 included the amount of compensation on his income, rejecting the claim of the assessee that since the amount related to a contract of the year 1948-49, it could be assessable for the assessment year 1949-50 This was confirmed by the Assistant Commissioner and the Tribunal in appeal But on a Reference under section 66 (1) the High Court held that the amount was assessable, but not for the assessment year 1951-52 The Department appealed to the Supreme Court

Held The question when the right to receive an amount under a contract accrues or arises depends upon the terms of a particular contract

Under section 4 (1) (b) (i) of the Income-tax Act an income accrues or arises when the assessee acquires a right to receive the same The meaning of the words 'accrues' and 'arises' cannot be extended so as to take in amounts received by the assessee in a later year, though the receipt was not on the basis of the right accrued in the earlier year Such amounts are in law received by the assessee only in the year when they are paid

The two principal methods of accounting for the income profits and gains of a business are the cash basis and the mercantile basis

The mercantile system of accountancy "brings into credit what is due immediately it becomes legally due and before it is actually received, and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed The book profits are taken for the purpose of assessment of tax, though the credit amount is not realized or the debit amount is not actually disbursed If an income accrues within a particular year, it is liable to be assessed in the succeeding year

The Officer in proceeding to include a particular income in the assessment should decide, if the assessee adopted the mercantile system of accounting subject to the deemed provisions, when the right to receive the amount accrued If the right accrued or arose to the assessee in a particular accounting year he shall include the said income in the assessment of the succeeding assessment year No power is conferred on the Officer under the Act, to relate back an income that accrued or arose in a subsequent year to another earlier year on the ground that the said income arose out of an earlier transaction Nor is the question of reopening of accounts relevant in the matter of ascertaining when a particular income accrued or arose

The provisions of the Indian Income-tax Act should be construed on their own terms without drawing any analogy from English statutes The English decisions cannot also be applied in the

matter of construction of the provisions of the Indian Income-tax Act, particularly when they have received an authoritative interpretation from the Supreme Court of India.

(The amount has to be assessed in the assessment year 1951-52.

Appeal from the Judgment and Order dated 15th March, 1960 of the Madras High Court in Case Referred No. 87 of 1955.†

Gopal Singh and R. N. Sachthey, Advocates, for Appellant.

K. Rajinder Chaudhuri and K. R. Chaudhuri, Advocates, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by certificate is preferred against the order of the High Court of Judicature at Madras holding that a sum of Rs. 12,447 received by the respondent from the Government during the accounting year 1950-51 was not assessable to tax for the assessment year 1951-52.

Gajapathy Naidu, the respondent, was supplying provisions to the Government Stanley Hospital, Royapuram, Madras. During the financial year April 1, 1948 to March 31, 1949, he entered into a contract with the Government for the supply of bread to the said hospital at the rate of Re. 0-4-6 per lb. As the respondent was maintaining his accounts on mercantile basis, it is common case that the amount due from the Government under the terms of the said contract was credited in the accounts of the respondent for that year. For the assessment year 1949-50 the Income-tax Officer assessed the respondent to income-tax on the basis of the accounts so made. It appears that some time after March 31, 1949, representations were made to the Government for relieving the respondent from the loss sustained in the supply of bread to the hospital. The Government by its order dated November 24, 1950, directed payment of compensation for the loss sustained by the respondent in respect of the supply of bread to the hospital during the year 1948-49 under the said contract. The respondent received on that account payment of Rs. 12,447 during the year of account 1950-51. In the assessment year 1951-52 the Income-tax Officer included the said amount in the assessment of that year. The assessee, *inter alia*, contended that he received the said sum in respect of the contract that was entered into by him with the Government during the accounting year 1948-49, and, therefore, it could not be included in the assessment year 1951-52. This contention was rejected by the Income-tax Officer and, on appeal, by the Appellate Assistant Commissioner and also, on further appeal, by the Income-tax Appellate Tribunal. But the contention received favour with the High Court on a Reference made to it under section 66(1) of the Indian Income-tax Act, 1922, hereinafter called the Act. The following two questions were referred to the High Court :

"1. Whether the sum of Rs. 12,447 is assessable to Income-tax ?

2. If so, whether it has been rightly assessed in the assessment year 1951-52."

On the first question the High Court held that the said amount was directly related to the business of the assessee and therefore, was taxable as a trade receipt. It answered the first question in the affirmative. No argument was raised before us on the question of the correctness of this finding. Therefore, nothing further need be said about it.

The High Court answered the second question in the negative. Its conclusion is based upon the following three steps :

1. "The only right of the assessee on the date, when he supplied the bread, was to debit the Government the contract rate. He was entitled to nothing further. The Government Order which raised the rates, came into existence long after. Payment thereunder was *ex gratia* and not on the basis of a right. Therefore, the amount of Rs. 12,447 was not, and indeed could not have been, debited in the books of the assessee for the year, when the supply of bread was made to the hospital namely, 1948-49. Those accounts have been closed."

2. "But where a receipt is correlated to and arises out of a commercial transaction between the parties, the right or liability should be deemed to have been established in the past accounting period. That principle is based not on any theory of accrual, because there was no legal right

existing then, but being correlated to the transaction, it should properly belong to it and the account should be re-opened when the payment came in."

3 "Being a receipt of an earlier year, the amount could not be included in the assessment for the year 1951-52.

On the said reasoning the High Court held that though in fact the right to receive the amount did not accrue during the accounting year 1948-49, it should be deemed to have related to the year of contract in respect whereof the amount was paid. The Commissioner of Income tax has preferred the present appeal against the said order of the High Court.

Learned Counsel for the Revenue contended that the High Court misdirected itself on the basis of English decisions and that on its finding that the amount accrued to the assessee only during the accounting year 1949-50 it should have held that the Income tax Officer had correctly included it in the assessee's income for the year 1950-51. Learned Counsel for the respondent argued that the said amount was paid in respect of the contract entered into between the assessee and the Government and therefore the said amount should properly belong to the accounting year 1948-49, and should not have been included in the assessment of the year 1951-52. To sustain his argument he relied upon certain English decisions referred to by the High Court which held that in such circumstances the relevant account of the year when the amount was due under the contract could be re-opened and the additional amount, though an *ex gratia* payment, could be included therein.

With great respect to the learned Judges of the High Court we must point out that the decision of the High Court is deflected by its reliance on English decisions delivered under circumstances peculiar to that country and on the construction of provisions which are not in *pari materia* with the provisions obtaining in India. The observations made by this Court in *Commissioner of Income tax v Vazir Sultan & Sons*¹, may usefully be restated.

"While considering the case-law it is necessary to bear in mind that the Indian Income tax Act is not in *pari materia* with the British Income-tax Statutes. It is less elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the Courts in England have had to deal. Little help can therefore be gained by attempting to construe the Indian Income tax Act in the light of decisions bearing upon the meaning of the Income-tax legislation in England. But on analogous provisions fundamental concepts and general principle unaffected by the specialities of the English Income tax Statutes, English authorities may be useful guides."

The caution administered by this Court shall always be borne in mind in construing the provisions of the Indian Statute. The provisions of the Indian Income tax Act shall be construed on their own terms without drawing any analogy from English statutes whose terms may superficially appear to be similar but on a deeper scrutiny may reveal differences not only in the wording but also in the meaning. A particular expression has acquired in the context of the development of law in that country.

The problem raised before us can only be answered on the true meaning of the express words used in section 4 (1) (b) (i) of the Act. It reads

"Subject to the provisions of this Act the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—
if such person is resident in the taxable territories during such year,—
accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year."

We are not concerned in this case with the expression "deemed to accrue or arise to him", as that expression refers to cases set out in the Statute itself introducing a fiction in respect of certain incomes. In regard to the question, when and whether an income accrues or arises within the meaning of the first part of the said clause, we have a decision of this Court which has clearly enunciated the principles underlying the said expression that is the decision in *E. D. Sassoon & Company, Ltd. v.*

*The Commissioner of Income-tax, Bombay City*¹. In that decision this Court accepted the definition given to the words "accrue" and "arise" by Mukerji, J., in *Rogers Pyatt Shellac & Co. v. Secretary of State for India*², which is as follows :

".....both the words are used in contradistinction to the word 'receive' and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate."

Under this definition accepted by this Court, an income accrues or arises when the assessee acquires a right to receive the same. It is commonplace that there are two principal methods of accounting for the income, profits and gains of a business ; one is the cash basis and the other, the mercantile basis. The latter system of accountancy

"brings into credit what is due immediately it becomes legally due and before it is actually received; and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed".

The book profits are taken for the purpose of assessment of tax, though the credit amount is not realized or the debit amount is not actually disbursed. If an income accrues within a particular year, it is liable to be assessed in the succeeding year. When does the right to receive an amount under a contract accrue or arise to the assessee. *i.e.*, come into existence ? That depends upon the terms of a particular contract. No other relevant provision of the Act has been brought to our notice—for there is none which provides an exception that though an assessee does not acquire a right to receive an income under a contract in a particular accounting year, by some fiction the amount received by him in a subsequent year in connection with the contract, though not arising out of a right accrued to him in the earlier year, could be related back to the earlier year and made taxable along with the income of that year. But that legal position is sought to be reached by a process of reasoning which found favour with English Courts. It is said that on the basis of proper commercial accounting practice, if a transaction takes place in a particular year, all that has accrued in respect of it, irrespective of the year when it accrues, should belong to the year of transaction and for the purpose of reaching that result closed accounts could be re-opened. Whether this principle is justified in the English law, it has no place under the Indian Income-tax Act. When an Income-tax Officer proceeds to include a particular income in the assessment, he should ask himself, *inter alia*, two questions, namely, (i) what is the system of accountancy adopted by the assessee ? and (ii) if it is mercantile system of accountancy, subject to the deemed provisions, when has the right to receive that amount accrued ? If he comes to the conclusion that such a right accrued or arose to the assessee in a particular accounting year, he shall include the said income in the assessment of the succeeding assessment year. No power is conferred on the Income-tax Officer under the Act, to relate back an income that accrued or arose in a subsequent year to another earlier year on the ground that the said income arose out of an earlier transaction. Nor is the question of re-opening of accounts relevant in the matter of ascertaining when a particular income accrued or arose. Section 34 of the Act empowers the Income-tax Officer to assess the income which escaped assessment or was under-assessed in the relevant assessment year. Subject to the provisions of the section and following the procedure prescribed thereunder, he can include the escaped income and re-assess the assessee on the basis of which the earlier assessment was made. So too, under section 35 of the Act, Officers mentioned therein can rectify mistakes either of their own motion or when such mistakes are brought to their notice by a party to the proceedings. For that purpose the correct item may be taken into consideration in the matter of assessment. But strictly speaking even in those cases there is no re-opening of the accounts of the assessee, but a re-assessment is made or the mistake is corrected on the basis of the actual income accrued or received by the assessee. We do not see any relevancy of the question of re-opening of accounts in considering the question when an assessee acquired a right to receive an amount.

1. (1954) S.C.J. 771 : (1955) 1 S.C.R. 313, 2. (1925) I.L.R. 52 Cal. 1 : 1 I.T.C. 363, 371.. 342.

We shall now proceed to notice some of the decisions cited at the Bar *J P Hall & Co v The Commissioners of Inland Revenue*¹, is a decision of the Court of Appeal under section 38 of the Finance (No 2) Act, 1915 (5 and 6 Geo V, c 89) dealing with excess profits duty. There it was held that for the purpose of Excess Profits Duty, the profits from the contracts for the purchase and sale of the control gear arose to the appellant-company in the accounting years in which the gear was actually delivered and not in the pre war period ending the 30th June, 1914, in which the contracts were made. The price of the control gear in that case was increased later without there being any contractual obligation but purely by a voluntary act of the purchaser. Though the additional amounts accrued to the assessee in a later year, it was regarded as analogous to a trade debt due in respect of the trading operation of the earlier year. On that principle the accounts were re-opened in order to bring the increase into profits of the assessee in the year of transaction. This decision was accepted and extended in *Severne (H M Inspector of Taxes) v Dadswell*². As this decision is the basis for the High Court's view, we shall give its facts in some detail. The respondent therein was granted a licence to mill flour in October 1941, and carried on the trade of flour milling until September, 1945. As he had not been a miller at the outbreak of war, he was not entitled to the benefit of a remuneration agreement whereby millers were compensated by the Ministry of Food for losses incurred under war time arrangements for the purchase of wheat and sale of flour. Having however, been informed by the Ministry in 1943 and twice later that the remuneration of millers who had begun milling during the period of control was under consideration, he made a claim in 1949 on the same basis as that laid down in the remuneration agreement and received payments in settlement. The respondent contended that the sums received in 1949 were not trading receipts but *ex gratia* payments, and alternatively, that they were received after the cessation of his trade and that if there was a debt arising to the trade at the date of cessation its value at that date was nil. The Court held that the said payments were *ex gratia*, and it further held that if on the discontinuance of a trade payment for work already done in a year had not been finally settled, accounts for that year could be re-opened so as to bring in a gratuitous payment for such work made in a subsequent year. This judgment certainly supports the respondent. Though it could be distinguished on the ground that in that case it was found that the payment for the work already done had not been finally settled whereas in the present case there is nothing on the record to disclose that it was not finally settled, we would prefer to base our conclusion on the ground that we cannot extend the meaning of the word "accrue" or "arise" in section 4 (1) (b) (i) of the Act so as to take in amounts received by the assessee in a later year, though the receipt was not on the basis of the right accrued in the earlier year. Such amounts are in law received by the assessee only in the year when they are paid. We cannot apply the English decisions in the matter of construction of the provisions of the Indian Act, particularly when they have received an authoritative interpretation from this Court. In this view, it is not necessary to consider further English decisions cited by learned Counsel for the respondent in support of his contention. Before a Division Bench of the Allahabad High Court in *Commissioner of Income tax, U.P. and V.P. v Kalicharan Jagannath*³, when a similar question arose, learned Counsel appearing for the Revenue relied upon the said English decisions but the High Court, rightly, refused to act on them on the ground that they were not relevant in interpreting section 4 of the Indian Income tax Act. It further made an attempt to distinguish those decisions on grounds based upon the alleged difference in the scope of the provisions of the respective countries. It was said that under the relevant English Act the excess profits duty was payable on computation of profits arising from a trade or business in different chargeable accounting periods and therefore, the emphasis there was more upon the carrying on of the trade within the chargeable period than on the income accruing during that period. But we do not propose to express our view on this aspect of the

¹ 1 L.R. (1921) 3 K.B. 152 90 L.J.K.B. 229 : 37 T.L.R. 744 (C.A.) 12 T.C. 382.

² (1954) 3 All.E.R. 241 35 T.C. 649
³ (1961) 41 I.T.R. 40

question, as the relevant sections of the English Acts have not been placed before us. The learned Judges, after having rightly refused to rely upon the English decisions, construed the provisions of the Indian Statute. There, during the accounting period 1st April, 1945 to 31st March, 1946, the assessee entered into a contract with and supplied fruits and bullock carts to the Military Authorities at two different places at rates fixed by the agreement. The assessee incurred a loss and he submitted a petition for review under the terms of the agreement. On 6th November, 1947, the Military Authorities sanctioned the payment of an additional sum which was paid to the assessee on 17th and 24th February, 1948. The Income-tax Department sought to include this additional sum in the assessment for the accounting year 1945-46. The High Court held that until the order of review the only right that the assessee had was to claim the money payable at the rates laid down in the agreement itself and that the additional amount became payable to the assessee not by virtue of any right conferred by the agreement, but because of the order passed in review directing the payment of the amount and thus creating a right to this amount in favour of the assessee. As the right to receive the payment of the additional sum arose after the closing of the accounting year 1945-46, the High Court proceeded to hold that the income did not accrue or arise to the assessee in the accounting year. It may be pointed out that in that case the original agreement gave a right to apply for review and notwithstanding that fact the Court held that the additional payment could not be held to have accrued during the accounting year. For the reasons already stated, by us, we are entirely in agreement with the view expressed by the Allahabad High Court.

In the result, we hold that the High Court in the present case should have answered the second question referred to it in the affirmative. The order of the High Court is set aside and the appeal is allowed with costs.

V.S. Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.)

The Commissioner of Income-tax, Madhya Pradesh, Nagpur and Bhandara Nagpur Appellant*

v.

M/s. Swadeshi Cotton and Flour Mills (Private) Limited, Indore Respondent.

Income-tax Act (XI of 1922), sections 10 (2) (x), 10 (5)—Profit Bonus—Nature and incidents of—Bonus payable for prior year paid in later year after the Tribunal award—Deduction—Claimable for the actual year of payment—Principle of re-opening of accounts—Not applicable under the Indian Income-tax Act.

The assessee-employer, paid in 1949 the bonus payable to the employees for the year 1947 after the Tribunal Award, and claimed the deduction under section 10 (2) (x) of the Income-tax Act in the assessment year 1950-51. The assessee maintained accounts in the mercantile basis. This amount was debited by the assessee in its profit and loss account for the year 1948 and the corresponding credit was given to the bonus payable account. The books of 1948 had not been closed till the date of the order of the Industrial Tribunal, 1949. The claim for deduction was not allowed by the Department and the Tribunal, but the High Court on Reference answered the point in favour of the assessee. The Department appealed by Special Leave to the Supreme Court.

Held, the claim for deduction was allowable for the assessment year 1950-51.

The question when the legal liability in respect of the bonus arises depends on the facts of the case and the nature of the bonus.

Workmen are entitled to make a claim for profit bonus; that has now attained the status of a legal right, when the wages fall short of the living standard and the industry makes huge profits part of which are due to the contribution which the workmen make in increasing production. The workmen have to make a claim from year to year and this claim has either to be settled amicably or by industrial adjudication and if there is loss or if no claim is made no bonus will be permissible.

* C.A. No. 587 of 1963. 17th April, 1964.

It is only when the claim to profit bonus is settled amicably or by industrial adjudication that a liability is incurred by the employer, who follows the mercantile system of accounting, within the meaning of section 10 (2) (x) and 10 (5)

If the claim to bonus was settled by the award of the Industrial Tribunal only in 1949 the only year the liability can be properly attributed to would be the year 1949

The system of re-opening of accounts either in respect of receipts or expenses does not fit in with the scheme of the Indian Income-tax Act

The principle mentioned by Lord Radcliffe in *Southern Railways of Peru Ltd v Owen* L.R. 1954 A.C. 334 would not apply to profit bonus. Bonus is strictly not wages, at least not for the purposes of computing liability to income tax. It is not an expense, in the ordinary sense of the term incurred for the purpose of earning profits. *A fortiori* profits have already been made. It is more like sharing of profits on the basis of a certain formula.

The words for the year in question in the Proviso to section 10 (2) (x) mean the year in respect of which bonus is paid and not for the year in which allowance is claimed.

Appeal by Special Leave from the Judgment and Order dated 30th November, 1960 of the Madhya Pradesh High Court in Miscellaneous Civil Case No. 73 of 1960

K N Rajagopal Sastri, Senior Advocate, (*R N Sachithy*, Advocate with him), for Appellant

S K Kapoor, Senior Advocate, (*S Murty* and *K K Jain*, Advocates, with him), for Respondent

The Judgment of the Court was delivered by

Sikri, J—The respondent, Swadeshi Cotton and Flour Mills, hereinafter referred to as the assessee, is a limited company which owns and runs a textile mill at Indore. For the assessment year 1950-51 (accounting year calendar year 1949), which was its first year of assessment under the Indian Income tax Act, 1922 (hereinafter referred to as the Act) it claimed that under section 10 (2) (x) of the Act it was entitled to an allowance in respect of the sum of Rs. 1,08,325 which it had paid as bonus for the year 1947 in the calendar year 1949, as a result of the award of the Industrial Tribunal, dated 13th January, 1949. The claim of the assessee was not accepted by the Income tax Authorities. The Appellate Tribunal held that it was a liability relating to an earlier year and not the year 1949. However, on an application by the assessee it stated a case and referred two questions. We are concerned only with one which reads thus

* Whether on the facts and in the circumstances of the case the assessee is entitled to claim a deduction of bonus of Rs. 1,08,325 relating to the calendar year 1947 in the assessment year 1950-51 ?

The High Court of Madhya Pradesh answered the question in the affirmative. The appellant, having failed to get a certificate under section 66-A (2) of the Act, obtained Special Leave from this Court, and that is how the appeal is before us.

The facts and circumstances referred to in the question have been set out in the Statement of the Case. Unfortunately, the facts are meagre, but since the appellant is content to base his case on a few facts, which will be referred to shortly, it is not necessary to call for a further Statement of the Case.

The facts, in brief, are as follows. The assessee paid as bonus to its employees the sum of Rs. 1,08,325 9-3 for the calendar year 1947 in terms of an award made on 13th January, 1949, under the Industrial Disputes Act. This amount was debited by the assessee in its profit and loss account for the year 1948 and the corresponding credit was given to the bonus payable account. The books for 1948 had not been closed till the date of order of the Industrial Tribunal, 13th January, 1949. This bonus was in fact paid to the employees in the calendar year 1949, the relevant assessment year being 1950-51.

The Appellate Assistant Commissioner had further found that

"Up to 1946 when the order for payment of bonus used to be received before the company's accounts for the year were finalised, the amount of bonus used to be in fact debited to the profit and loss account of the respective year."

This finding is repeated by the Appellate Tribunal in its appellate order.

On these facts the learned Counsel for the appellant, Mr. Sastri, contends that according to the mercantile system of accounting, which is followed by the assessee, and on which its profits have been computed for the accounting calendar year 1949, the year to which the liability is properly attributable is the calendar year 1947 and not 1949. He says that it was a legal liability of the assessee which arose in 1947 and should have been estimated and put into the accounts for 1947. In the alternative he has invited us to re-open the accounts for the year 1947, following the practice which, according to him, obtains in England.

In our opinion, the answer to the question must depend on the proper interpretation of section 10 (2) (x), read with section 10 (5), of the Act. These provisions read as follows :—

“Section 10 (2) (x)—Any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission :

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

- (a) the pay of the employee and the conditions of his service ;
- (b) the profits of the business, profession or vocation for the year in question ; and
- (c) the general practice in similar businesses, professions or vocations.”

“Section 10 (5).—In sub-section (2), ‘paid’ means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section ;.....”

If we insert the definition of the word ‘paid’ in sub-clause (x), it would read as follows :

“any sum actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section, to an employee as bonus.....”

As the assessee’s profits and gains have been computed according to the mercantile system, the question, using for the time being the terms of the clauses, comes to this :—

“Has this sum of Rs. 1,08,325 been incurred by the assessee according to the mercantile system in the calendar year 1947 or 1949?”

At first sight the sentence does not read well, but the meaning of the word ‘incur’ includes ‘to become liable to’. Therefore, the question boils down to :

“In what year did the liability of this sum of Rs. 1,08,325 arise, according to the mercantile system?”

The mercantile system of accounting was explained in a judgment of this Court in *Keshav Mills, Ltd. v. Commissioner of Income-tax, Bombay*¹, thus :—

“That system brings into credit what is due, immediately it becomes legally due and before it is actually received, and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed.”

These observations were quoted with approval in *Calcutta Co., Ltd v. Commissioner of Income-tax, West Bengal*².

On the facts of this case, then when did the legal liability arise in respect of the bonus? This depends on the facts of the case and the nature of the bonus awarded in this case. This Court has examined the nature of profit bonus—it is common ground that the bonus with which we are concerned with was a profit bonus—in various cases. It is explained in *Muir Mills v. Suti Mills Mazdoor Union*³, that:

“There are two conditions which have to be satisfied before a demand for bonus can be justified and they are : (1) when wages fall short of the living standard, and (2) the industry makes huge profits part of which is due to the contribution which the workmen makes in increasing production. The demand for bonus becomes an industrial claim when either or both these conditions are satisfied.”

1. (1953) S.C.J. 343 : (1953) S.C.R. 950.

2. (1959) 37 I.T.R. 1 : A.I.R. 1959 S.C.

1165: (1960) 1 S.C.R. 185.

3. (1955) 1 S.C.R. 991: (1955) 1 M.L.J.

(S.C.) 127: (1955) S.C.J. 214.

This matter was again considered in the case of *Associated Cement Co v Their Workmen*¹. This Court observed

"It is relevant to add that in dealing with the concept of bonus this Court ruled that bonus is neither a gratuitous payment made by the employer to his workmen nor can it be regarded as a deferred wage. According to this decision where wages fall short of the living standard and the industry makes profit part of which is due to the contribution of labour, a claim for bonus can be legitimately made."

In 1961, this Court was able to say that

"The right to claim bonus which has been universally recognised by Industrial adjudication in cases of employment falling under the said Act has now attained the status of a legal right. Bonus can be claimed as a matter of right provided of course by the application of the Full Bench formula it is shown that for the relevant year the employer has sufficient available surplus in hand. Vide *Gajendragadkar, J.*, as he then was, in *Workmen v Hercules Insurance Co*²."

In *Indian Tea Association v Workmen*³, this Court held that

"The profit bonus can be awarded only by reference to a relevant year and a claim for such bonus has therefore to be made from year to year and has to be settled either amicably between the parties or if a Reference is made it has to be determined by Industrial adjudication. A general claim for the introduction of profit bonus cannot be made or entertained in the form in which it has been done in the present proceedings."

It follows from the above decisions of this Court that

- (a) workmen are entitled to make a claim to profit bonus if certain conditions are satisfied;
- (b) the workmen have to make a claim from year to year;
- (c) this claim has either to be settled amicably or by industrial adjudication, and
- (d) if there is a loss or if no claim is made, no bonus will be permissible.

In our opinion it is only when the claim to profit bonus, if made, is settled amicably or by industrial adjudication that a liability is incurred by the employer, who follows the mercantile system of accounting, within section 10 (2) (x), read with section 10 (5) of the Act.

On the facts of this case, it is clear that it was only in 1949 that the claim to profit bonus was settled by an award of the Industrial Tribunal. Therefore, the only year the liability can be properly attributed to is 1949, and hence we are of the opinion that the High Court was right in answering the question in favour of the assessee.

The second contention of the learned Counsel does not appeal to us. We are of the opinion that this system of re-opening accounts does not fit in with the scheme of the Indian Income tax Act. We have already held in *Commissioner of Income-tax, Madras v A Gajapathy Naidu Madras*⁴, that as far as receipts are concerned, there can be no re-opening of accounts. The same would be the position in respect of expenses. But even in England accounts are not opened in every case. Halsbury gives various instances in Foot note (m) at page 148, Vol 20. Mr. Sastri has relied on various English cases but it is unnecessary to refer to them as Lord Radcliffe explains the position in England in *Southern Railway of Peru, Ltd v Owen*⁵; thus

"The Courts have not found it impossible hitherto to make considerable adjustments in the actual fall of receipts or payments in order to arrive at a true statement of the profits of successive years. After all that is why income and expenditure accounting is preferred to cash accounting for this purpose. As I understand the matter, the principle that justified the attribution of some thing that was in fact received in one year to the profits of an earlier year, as in such cases as *Isac Holden & Sons v Inland Revenue Commrs*⁶, and *Newcastle Breweries Ltd v Inland Revenue Commrs*⁷ was just this that the payment had been earned by services given in earlier year and therefore a true statement of profit required that the year which had borne the burden of the cost should have appropriated to it the benefit of the receipt."

The principle mentioned by Lord Radcliffe would not apply to a profit bonus. As stated above, a profit bonus is strictly not wages, at least not for the purpose of computing liability to income tax, it is not an expense in the ordinary sense of the

1 (1959) S.C.R. 925 A.I.R. 1959 S.C. 967

2 (1961) 2 S.C.R. 995 A.I.R. 1961 S.C. 833

3 (1962) S.C.R. (1) S.C.R. 457 A.I.R. 1962

S.C. 1340

4 Since reported in (1964) 2 I.T.J. 238

term, incurred for the purpose of earning profits. *A fortiori* profits have already been made. It is more like sharing of profits on the basis of a certain formula.

One other point raised by Mr. Sastri remains. He urged that the words 'for the year in question' in the Proviso to sub-section 10 (2) (x) mean 'for the year in which allowance is claimed'. We are unable to agree with him. The words 'for the year in question' mean the year in respect of which bonus is paid.

In the result, the appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT:—K. SUBBA RAO, J.C. SHAH AND S.M. SIKRI, JJ.

The Commissioner of Income-tax, U.P., Lucknow

.. *Appellant**

v.

The Kanpur Coal Syndicate, Kanpur

.. *Respondent.*

Income-tax Act (XI of 1922), sections 3, 14, 30, 31 (3) and 33 (5)—Association of persons or members—Optional power of Income-tax Officer to assess either—Assessment as Association of persons—Right to appeal and claim to be assessed as individuals—Appellate Authorities—Powers in disposing of appeal—Power to set aside assessment and to direct Officer to assess members of Association.

For the assessment year 1948-49 the Income-tax Officer taxed the assessee as an Association of persons rejecting its claim that the members of the association should be assessed individually. The appeal by the assessee to the Appellate Commissioner was dismissed. The Tribunal on further appeal, held that though the Officer had the power to assess the Association of persons or the members individually at his option, the Tribunal had no power to direct the officer to exercise his power in one way or another. On a Reference under section 66 (2), the High Court held that the Tribunal had the power to set aside the officer's assessment against the Association and to give consequential and ancillary directions to the said Officer to assess the individuals. The Department appealed to the Supreme Court.

Held, The Appellate Tribunal has jurisdiction to give directions to the appropriate Authority to cancel the assessment made on the association of persons and to give appropriate directions to the Authority concerned to make a fresh assessment on the members of that association individually.

Section 3 of the Act impliedly gives an option to an appropriate authority to assess the total income of either the association of persons or the members of such association individually.

Under section 30 of the Act an assessee objecting to the amount of income assessed under section 23 or the amount of tax determined under the said section or denying his liability to be assessed under the Act can prefer an appeal against the order of the Income-tax Officer to the Appellate Authority. The expression 'denial of liability' is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. An assessee who has been assessed as an Association of persons has a right of appeal under section 30 against the order and to claim to be assessed as individuals.

Under section 31 of the Act the Appellate Commissioner has plenary powers in disposing of an appeal and he can do what the Income-tax Officer can do and also direct the officer to do what he has failed to do.

Under section 33 (5) the Appellate Tribunal has also ample powers to set aside the assessment made on the association of persons and direct the officer to assess the individuals or to direct the amendment of the assessment already made on the members.

Appeal from the Judgment and Decree dated 22nd September, 1960 of the Allahabad High Court in Income-tax Miscellaneous Case No. 188 of 1953.

S. K. Kapur, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for Appellant.

Veda Vyasa, Senior Advocate (*Naunit Lal*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—The question for decision in this appeal is whether when the Income-tax Officer in his discretion assessed an association of persons to income-tax, the Appellate Assistant Commissioner in appeal or the Income-tax Appellate

Tribunal in further appeal can set aside that order and direct him to assess the members of that association individually

The facts lie in a small compass and they are as follows. The assessee consisted of several persons combined together for the purpose of purchasing coal in order to supply the same to customers for domestic purposes and other small scale industries. For the assessment year 1948-49 the Income tax Officer levied tax upon the total income in the hands of the said association of persons. The assessee claimed that in the circumstances of the case it should not be assessed to tax as an association of persons, but the proportion of the income in the hands of each of the members of the association might be assessed to tax instead. As the Income tax Officer did not comply with this request, the assessee preferred an appeal to the Appellate Assistant Commissioner, but it was dismissed. On a further appeal to the Income tax Appellate Tribunal, the Tribunal held that though the Income tax Officer had the power to assess the income of the association of persons as such or in the alternative on the individual members thereof in respect of their proportionate share in the income, it (the Tribunal) had no power under the Act to direct the Income-tax Officer to exercise his power in one way or other. The following question was referred to the High Court of Allahabad under section 66 (2) of the Indian Income-tax Act, 1922.

"If in pursuance of section 3 of the Indian Income tax Act the Income-tax Officer levies the income-tax in respect of the total income of the previous year of an association of persons upon the said association of persons as a collective unit, whether the Tribunal is competent to direct the Income-tax Officer to levy the income tax proportionately upon the individual members of the said association of persons in respect of the proportionate income of each of the members consisting the said association of persons."

A Division Bench of the High Court held that the Appellate Tribunal had power to set aside the Income-tax Officer's assessment against the association and to give consequential and ancillary directions to the said Officer to assess the individuals.

Learned Counsel for the Revenue contends that under the Indian Income-tax Act, 1922, hereinafter called the Act, the Income tax Officer has no option but to assess the total income of the association of members, though the individual's share in the income may be added to his individual income for the purposes of ascertaining his total income. He further argues that even if the Income tax Officer has the option to assess to income tax the association of persons on its total income or the individual members thereof in respect of their proportionate share of the income, if he had exercised the option in one way or other neither the Appellate Assistant Commissioner in appeal nor the Income tax Appellate Tribunal in further appeal has power to direct the Income tax Officer to exercise his discretion in a different way; and for this conclusion he seeks to draw strength from his further submission that no appeal lies at the instance of the association of persons when they are assessed as one unit on the ground that the Officer should have assessed the individual members of the said association.

At the outset it will be convenient to read the relevant provisions of the Act.

Section 3—Charge of income-tax—Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority and of every firm and other association of persons or the partners of the firm or the members of the association individually.

Section 14 (2) The tax shall not be payable by an assessee—

(b) if a member of an association of persons other than a Hindu undivided family, a company or a firm in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association.

Section 30 (1) Any assessee objecting to the amount of income assessed under section 23 or the amount of tax determined under section 23 may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order.

Section 31 (3) In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment,—

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment.

* * * * *

(4) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or associations of persons is ordered to be made, the Appellate Assistant Commissioner may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association.

Section 3 imposes a tax upon a person in respect of his total income. The persons on whom such tax can be imposed are particularized therein, namely, Hindu undivided family, company, local authority, firm, association of persons, partners of firm or members of association individually. The section, therefore, does not in terms confer any power on any particular Officer to assess one of the persons described therein, but is only a charging section imposing the levy of tax on the total income of an assessable entity described therein. The section expressly treats an association of persons and the individual members of an association as two distinct and different assessable entities. On the terms of the section the tax can be levied on either of the said two entities according to the provisions of the Act. There is no scope for the argument that under section 3 the assessment shall be only on the association of persons as a unit though after such assessment the share of the income of a member of that association may be added to his other income under section 14 (2) of the Act. This construction would make the last words of the section, viz., "members of the association individually" a surplusage. This argument, is also contrary to the express provisions of section 3, which mark out the members of the association individually as a separate entity from the association of persons. Income of every person whether he is a member of an association or not is liable to the charge under the head "every individual". Section 14 (2) (b) only says that if such an individual happens to be a member of an association of persons which has already been assessed, the tax would not be payable in respect of the share of his income again. That under the Act an assessment can be made on an association of persons as a unit or, alternatively, on the individual members thereof in respect of their respective shares of the income was assumed by this Court in *Commissioner of Income-tax v. Raja Reddy Mallaram*¹. We, therefore, hold that section 3 impliedly gives an option to an appropriate authority to assess the total income of either the association of persons or the members of such association individually.

The next question is whether the said option is given only to the Income-tax Officer and is denied to the Appellate Assistant Commissioner and the Appellate Tribunal. Under the Act the Income-tax Officer, after following the procedure prescribed, makes the assessment under section 23 of the Act. Doubtless in making the assessment at the first instance he has to exercise the option whether he should assess the association of persons or the members thereof individually. It is not because that any section of the Act confers an exclusive power on him to do so, but because it is part of the process of assessment; that is to say, he has to ascertain who is the person liable to be assessed for the tax. If he seeks to assess an association of persons as an assessable entity, the said entity can object to the assessment, *inter alia*, on the ground that in the circumstances of the case the assessment should be made on the members of the association individually. The Income-tax Officer may reject its contention and may assess the total income of the association as such and impose the tax on it. Under section 30 an assessee objecting to the amount of income assessed under section 23 or the amount of tax determined under the said section or denying his liability to be assessed under the Act can prefer an appeal against the order of the Income-tax Officer to the Appellate Assistant Commissioner. It is said that an order made by the Income-tax Officer rejecting the plea of an associa-

1. (1964) 1 I.T.J. 180 : (1964) 1 S.C.J. 256 : (1964) 1 M.L.J. (S.C.) 75 : (1964) 1

An. W.R. (S.C.) 75.

tion of persons that the members thereof shall be assessed individually does not fall under one or other of the three heads mentioned above. What is the substance of the objection of the assessee? The assessee denies his liability to be assessed under the Act in the circumstances of the case and pleads that the members of the association shall be assessed only individually. The expression "denial of liability" is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case the denial is a denial of liability to be assessed under the provisions of the Act. In one case the assessee says that he is not liable to be assessed to tax under the Act, and in the other case the assessee denies his liability to tax under the provisions of the Act if the option given to the appropriate Officer under the provisions of the Act is judicially exercised. We, therefore, hold that such an assessee has a right of appeal under section 30 of the Act against the order of the Income tax Officer assessing the association of members instead of the members thereof individually. If an appeal lies, section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under section 31 (3) (a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment, under clause (b) thereof he may set aside the assessment and direct the Income tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is coterminous with that of the Income tax Officer. He can do what the Income tax Officer can do and also direct him to do what he has failed to do. If the Income tax Officer has the option to assess one or other of the entities in the alternative, the Appellate Assistant Commissioner can direct him to do what he should have done in the circumstances of a case. Under section 33 (1), an assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within 60 days of the date on which such order is communicated to him. Under section 33 (4),

"The appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit and shall communicate any such orders to the assessee and to the Commissioner."

Under section 33 (5)

"Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made the Appellate Tribunal may authorise the Income tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association."

Under this section the Appellate Tribunal has ample power to set aside the assessment made on the association of persons and direct the Income tax Officer to assess the individuals or to direct the amendment of the assessment already made on the members. The comprehensive phraseology used both in section 31 and section 33 of the Act does not countenance the attempt of the Revenue to restrict the powers of the Assistant Appellate Commissioner or of the Appellate Tribunal both of them have power to direct the appropriate authority to assess the members individually instead of the association of persons as a unit.

We, therefore, hold, agreeing with the High Court, that the Appellate Tribunal has jurisdiction to give directions to the appropriate authority to cancel the assessment made on the association of persons and to give appropriate directions to the authority concerned to make a fresh assessment on the members of that association individually. The answer given by the High Court to the question propounded is correct.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S. M. SIKRI, JJ.

The Commissioner of Income-tax, Madras

.. Appellant*

v.

A. Krishnaswami Mudaliar and others

.. Respondents.

Income-tax Act (XI of 1922), sections 66, 10, 12 and 13—Reference—Business profits—Income-tax Officer—Value of closing stock added to profits as returned—Appeal—Only plea of assessee, quantum of estimation—Question of valuation of stock in computation of business profit on the basis of change of method of accounting—Not a question arising from order of Tribunal.

Closing stock—Business profits—Method of accounting—Cash or Mercantile—Valuation of closing stock in either case, essential—Officer not bound by statement of account furnished by assessee.

The assessee, a firm constituted in December, 1947, purchased the exploitation rights in a cinematograph film for a sum of lakh of rupees and for a period of four years. For the assessment year 1949-50, the previous year being the period 25th December, 1947, to 2nd August, 1948, the firm filed a voluntary return showing a profit. The assessee maintained the accounts in the cash basis and the excess of total receipts over the cost of acquiring the film less expenses was shown as the profit. On 15th August, 1948, one of the partners sold his half interest in the assets of the firm for Rs. 2,000 to another partner and retired. The Income-tax Officer in the view that the true profits of the firm could not be computed without valuing the stock-in-trade, estimated the value of unexpired exploitation rights at Rs. 65,000 and added the sum to the profit already shown in the return. In appeal to the Appellate Assistant Commissioner and further appeal to the Tribunal, the plea of the assessee was confined to estimation of the value of unexpired exploitation rights. The Tribunal reduced the valuation. In Reference proceedings under section 66 (2) of the Act, the High Court answered the question, 'Whether the Tribunal was justified in applying the Proviso to section 13 of the Act and in confirming the assessment on a mercantile basis of accounting?' in the negative and in favour of the assessee. The Department appealed, with Special Leave, to the Supreme Court.

Held, It cannot be held that because the assessee had maintained his accounts in the cash system it was not open to the Income-tax Officer to add to the receipts from the business the value of the stock in-trade at the end of the year for the purpose of properly deducing the profits of the business for the year in question.

The Income-tax Officer held in the order of assessment that the assessee firm had not made a stock valuation of the film and had merely taken the excess collection over the purchase value and had submitted its return of income on that basis. No express order was recorded by him that in his opinion the income, profits or gains of the business could not properly be deducted from the method of accounting employed by the firm, but it is implicit in what is stated by him that without valuation of the unexpired exploitation rights the profits of year of account could not be computed. In appeals to the Appellate Assistant Commissioner and the Tribunal the only plea raised by the assessee was that the Officer had erred in estimating the value of the unexpired exploitation rights. The Tribunal partially accepted the plea and reduced the value. No question of the regularity of the proceedings of the Officer by the adoption of the mercantile system of accounting and by the application of the Proviso to section 13 of the Act would arise from the order of the Tribunal.

Section 13 of the Act only deals with the computation of income, profits and gains for the purposes of sections 10 and 12 and does not purport to enlarge or restrict the content of taxation income, profit and gains under the Act. Where in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced from the method of accounting adopted by the assessee, it is open to him to compute the income upon such basis in such manner as he may determine. The section does not compel the Officer to accept a balance sheet of cash receipts and outgoing prepared from the books of account; he has to compute the income in accordance with the method of accounting regularly employed by the assessee. But whatever be the method of accounting cash basis or mercantile basis, in the case of a trading venture, for computing the true profits of the year the stock-in-trade must be taken into account.

Under the Act for the purpose of assessment each year is self-contained unit and if out of the receipts the cost of the film was to be deducted in the absence of an entry crediting the value of the asset at the end of the year for arriving at the income or the profit of the firm would either wholly or substantially be absorbed in the amortization of the capital value of the asset. The result of the accounting would therefore give a false picture of the partnership, however lucrative the business may in reality be.

Appeal by Special Leave from the Judgment and Order dated 2nd February, 1960, of the Madras High Court in Case Referred No. 1 of 1955.

R. Ganapathy Iyer and R. N. Sachithy, Advocates, for Appellant.

S. Narayanaswamy and R. Gopalakrishnan, Advocates, for Respondents Nos. 1 and 3 to 6.

The Judgment of the Court was delivered by

Shah, J—The respondents are a firm constituted under a deed dated 12th December, 1947. The firm originally consisted of three partners—K. N. Damodara Mudaliar, A. Krishnaswami Mudaliar and V. Thangaraja Mudaliar. K. N. Damodara Mudaliar acquired for the firm for Rs. 1,00,000 the exploitation rights which were to endure for four years in a cinematograph film "Apoorva Chinthamani" for the North Arcot, the South Arcot and the Chingleput Districts and for Pondicherry. For the period, 25th December, 1947 to 2nd August, 1948, which was "the previous year" corresponding to the assessment year 1949-50 the firm filed a voluntary return declaring that Rs. 28,643 were earned by the exploitation of the film. In the statement submitted by the firm the total receipts credited in the firm's books were Rs. 1,46,849 and against that amount were debited Rs. 18,206 as expenses and Rs. 1,00,000 as the amount disbursed for acquiring the exploitation rights. Thereby in the computation of the profits of the business, the firm debited the amount paid for acquiring the rights of exploitation of the film, but did not take credit for the value of the unexpired exploitation rights at the end of the 'previous year'. On 15th August, 1948, a deed of dissolution of the partnership was executed, and Damodara Mudaliar sold with effect from 6th August 1948, his half interest in the assets of the partnership to Krishnaswami Mudaliar for Rs. 2,000 and retired from the partnership. On 27th August, 1948, a trial balance sheet of the firm's books of account was prepared showing a cash balance of Rs. 190,124.1 debit against Krishnaswami Mudaliar for Rs. 2,641.88 and credits in favour of Damodara Mudaliar and Thangaraja Mudaliar respectively for Rs. 1,888.21 and Rs. 944.21. Thereafter Krishnaswami Mudaliar, Thangaraja Mudaliar and V. S. Lakshmanan (an outsider) formed themselves into another partnership to exploit the film for the unexpired period. From this partnership Krishnaswami Mudaliar retired on 22nd February, 1949, agreeing to receive Rs. 12,000 for his sixteenth share in the assets of the firm on the date of retirement.

In the assessment of the respondent firm for the year 1949-50 the Second Additional Income tax Officer, Vellore, declined to accept the statement of account that the firm had earned till 2nd August, 1948 a net profit of only Rs. 28,643 as truly representing the profits of the firm. He observed that "no stock valuation of the picture has been taken but only the excess collection over purchase value has been returned" indicating thereby that in his view from the statement of account which omitted to include at the close of the year the value of the rights in the film for the unexpired period the profits of the firm could not properly be deduced. The Income-tax Officer estimated the value of the rights for the unexpired period of exploitation to which the firm was entitled on 2nd August, 1948 at Rs. 65,000 and computed the net profits of the firm as an unregistered firm at Rs. 93,642 and assessed income-tax and super tax payable by the firm on that footing.

In appeal by the firm to the Appellate Assistant Commissioner the correctness of the estimated value of the exploitation rights of the film at Rs. 65,000 was alone challenged and it was submitted that the sum of Rs. 4,000 was the true value of the assets at the end of the previous year, Damodara Mudaliar the retiring partner having relinquished his rights representing half share for Rs. 2,000 only. The Appellate Assistant Commissioner rejected the contention holding that the valuation of the exploitation rights for the unexpired period in the deed of dissolution dated 15th August, 1948, was "dictated by extra-commercial considerations", and confirmed the valuation of Rs. 65,000 made by the Income tax Officer. Even in appeal to the Income tax Appellate Tribunal, Madras the respondent firm merely contended that the valuation of the exploitation rights for the unexpired period was excessive. The Tribunal partially upheld the plea, and reduced the valuation to Rs. 40,000 as on 2nd August, 1948, and directed modification of the assessment on that footing.

Pursuant to an order issued by the High Court of Madras in a petition under section 66 (2) the Tribunal stated the case and referred the following question.

* Whether on the facts and circumstances of this case the Tribunal was justified in applying the Proviso to section 13 of the Income-tax Act and in confirming the assessment on a mercantile basis of accounting."

The High Court held that it was open to the assessee to maintain accounts according to a recognised system of accounting and the assessee having adopted the cash system of accounting, and the Tribunal having assigned no reasons for discarding that system in the computation of the profits, the Tribunal was in error in making the assessment on the basis of the mercantile system of accounting. The High Court observed :

“When we reach the position that it was the cash system that the assessee had adopted in this case, and that valuation of the closing stock was not an incident of that system for ascertaining the profits, it should be obvious that the Income-tax Officer had no power under the Proviso to section 13 to force a different system on the assessee either the mercantile system or a hybrid system of cash plus valuation of closing stock.”

The High Court accordingly answered the question referred in the negative. Against the order, with Special Leave, this appeal is preferred.

The question to be determined in this appeal is whether in the computation of the income of the firm under the head “Profits and gains of business” the Income-tax Officer was bound by the method of accounting in which the cost of acquisition of the film of which the exploitation rights were held was debited at the commencement of the year, but the value of the film at the end of the year was ignored. Section 10 of the Indian Income-tax Act, 1922, provides that tax shall be payable by an assessee under the head “Profits and gains of business, profession or vocation” in respect of the profits or gains of any business, profession or vocation carried on by him. Such profits or gains have to be computed after making the allowances set out in sub-section (2). Section 13 provides that the income, profits and gains shall be computed, for the purposes of sections 10 and 12 in accordance with the method of accounting regularly employed by the assessee, provided that, if no method of accounting has been regularly employed or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

It may be recalled that the Income-tax Officer had in the order of assessment observed that the firm had not made a stock valuation of the film and had merely taken the excess collection over the purchase value and had submitted its return of income on that basis. No express order was recorded by the Income-tax Officer that in his opinion the income, profits or gains of the business could not properly be deduced from the method of accounting employed by the firm, but it is implicit in what is stated by him that without valuation of the unexpired exploitation rights the profits of the year of account could not be computed. With this view, it appears, the Appellate Assistant Commissioner agreed.

It appeal to the Appellate Tribunal the only plea raised was that the Income-tax Officer had erred in estimating the value of the unexpired exploitation rights at Rs. 65,000. That was partially accepted, and the value was reduced to Rs. 40,000. It is difficult to appreciate how any question about the regularity of the proceedings of the Income-tax Officer by the adoption of the mercantile system of accounting and by the application of the Proviso to section 13 of the Income-tax Act arose from the order of the Tribunal. The High Court has under the Income-tax Act power to call upon the Appellate Tribunal to state a case, only if the High Court is not satisfied about the correctness of the decision of the Tribunal that no question of law arises from the order of the Tribunal. The grounds of appeal filed before the Tribunal and before the Appellate Assistant Commissioner make it abundantly clear that the question as to the applicability of the Proviso to section 13 to the profits disclosed by the respondent firm was never challenged. Nor could it be said that the Tribunal “forced the . . . firm to adopt for the purpose of computation of its profits” a system of accounting other than the one adopted by the firm. In the title of the order by the Income-tax Officer it was recited that the method of accounting adopted by the firm was “mercantile”, but that does not amount to saying that he proposed to compute the income on the basis that the accounts should be re-written on the mercantile system.

The question referred to the High Court asks for advice on the justification for applying the Proviso to section 13, and computation of the income on the basis of the mercantile system of accounting. On neither of these two branches there was any argument raised by the firm before the Tribunal. But we do not propose to dispose of this appeal on the limited ground that the question as framed did not arise out of the order of the Tribunal and need not be answered. The grounds given by the High Court in support of their answer to the question referred raise a matter of principle of some importance in the computation of income of an assessee carrying on a trading venture with the aid of a wasting asset, and we have heard elaborate arguments advanced by Counsel at the Bar and we deem it necessary to express our opinion on the questions debated.

It is true that the Revenue Authorities and the Tribunal did take into consideration the stock valuation at the end of the year of account, but that was not because in their view the system of accounting adopted was or should be mercantile. The truth of the matter is that in their view, profits of the firm for the year could not, having regard to the nature of the business, properly be deduced from the accounts "unless the opening and closing stocks were brought into the picture." This is made clear by the observations of the Tribunal in paragraph 15 of the Statement of the Case.

in all trading cases the true profits cannot be deduced from any system of maintaining accounts whether cash or mercantile, unless the opening and closing stocks are brought into the picture at cost or market price whichever is lower, it will not avail an assessee to say that in his cash system he had not made any profit on his cash sales till all his stock is disposed of. Income-tax is an annual levy and the profits of each year require to be ascertained for that purpose as accurately as circumstances permit. If therefore, in any system of accounting maintained by the assessee, otherwise acceptable, the stocks are left out of account, the aforesaid proviso it is humbly submitted, necessarily has to be invoked, even if it were for the sole purpose of adjusting the book figures for the stock figures.

Correctness of this view especially in the context of a trading venture by the exploitation of a wasting asset, but which is the assessee's stock-in trade, falls to be considered.

Section 13 of the Indian Income-tax Act was incorporated for the first time in the Income tax legislation in India by the Income-tax Act (XI of 1922), because in a case decided under the Income tax Act, 1918, *Wallis, C J*, delivering the principal judgment of the Full Bench in *Secretary, Board of Revenue, Madras v Arumachala Chettiar*¹, expressed the view that whatever may be the system of accounting adopted by an assessee income assessable to tax means the income actually or constructively received and that the words of the charging section placed limits upon the succeeding sections specifying the different classes of income liable to tax. To supersede this exposition of the law the Legislature while enacting Act (XI of 1922) found it necessary to enact section 13. The section leaves it to the assessee to adopt any system of accounting and obliges the Income tax Officer to compute the income, profits and gains for the purposes of sections 10 and 12 in accordance with such method of accounting regularly employed, if profits of the business can properly be deduced therefrom. The Judicial Committee of the Privy Council observed in *Commissioner of Income Tax, Bombay v Sarangpur Cotton Manufacturing Company Ltd., Ahmedabad*²

the section relates to a method of accounting regularly employed by the assessee for his own purposes and does not relate to a method of making up the statutory return for assessment to Income-tax. Secondly, the section clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the Income tax Officer, the income profits and gains cannot properly be deduced therefrom. It may well be that, although the profit brought out in the accounts is not the true figure for Income-tax purposes, the true figure can be accurately deduced therefrom."

The Board also observed -

"It is the duty of the Income-tax Officer, where there is such a method of accounting, to consider whether the income, profits and gains can properly be deduced therefrom, and to proceed according to his judgment on this question."

Again as observed by this Court in *Commissioner of Income-tax v. Macmillan & Co.*,¹ the expression "in the opinion of the Income-tax Officer" in the Proviso to section 13 of the Indian Income-tax Act, 1922, does not confer a mere discretionary power; in the context it imposes a statutory duty on the Income-tax Officer to examine in every case the method of accounting employed by the assessee and to see whether or not it has been regularly employed and to determine whether the income, profits and gains of the assessee could properly be deduced therefrom.

But the section only deals with the computation of income, profits and gains for the purposes of sections 10 and 12 and does not purport to enlarge or restrict the content of taxable income, profit and gains under the Act. Section 2 (15) of the Act defines "total income" as meaning total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in the Act. Section 4 (1) lays down what income shall be included in the total, income, and sections 10 (2), 12 (2), 12-B (2), 14, 15-A, 15-B, 15-C and 16 prescribe the manner of computation of income, profits and gains in different circumstances, and also prescribe special exemptions. Section 13 does not directly impinge upon the application of these provisions: it merely prescribes that the computation of taxable profits shall be made according to the method of accounting regularly employed. Where in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced from the method of accounting, it is open to the Income-tax Officer to compute the income upon such basis and in such manner as he may determine. The section does not compel the Income-tax Officer to accept a balance-sheet of cash receipts and outgoings prepared from the books of account; he has to compute the income *in accordance with* the method of accounting regularly employed by the assessee.

The only departure made by section 13 of the Indian Income-tax Act from the tax legislation in England is that whereas under the English legislation the Commissioner is not obliged to determine the profits of a business venture, according to the method of accounting adopted by the assessee, under the Indian Income-tax Act, *prima facie*, the Income-tax Officer has for the purpose of sections 10 and 12 to compute the income, profits and gains in accordance with the method of accounting regularly employed by the assessee. If, therefore, there is a system of accounting regularly employed and by appropriate adjustments from the accounts maintained taxable profit may properly be deduced, the Income-tax Officer is bound to compute the profits in accordance with the method of accounting. But where in the opinion of the Income-tax Officer the profits cannot properly be deduced from the system of accounting adopted by the assessee it is open to him to adopt a more suitable basis for computation of the true profits.

Among Indian businessmen, as elsewhere, there are current two principal systems of book-keeping. There is, firstly, the cash system in which a record is maintained of actual receipt and actual disbursements, entries being posted when money or money's worth is actually received, collected or disbursed. There is, secondly, the mercantile system, in which entries are posted in the books of account on the date of the transaction, *i.e.*, on the date on which rights accrue or liabilities are incurred, irrespective of the date of payment. For example, when goods are sold on credit, a receipt entry is posted as of the date of sale, although no cash is received immediately in payment of such goods; and a debit entry is similarly posted when a liability is incurred although payment on account of such liability is not made at the time. There may have to be appropriate variations when this system is adopted by an assessee who carries on a profession. Whereas under the cash system no account of what are called the outstandings of the business either at the commencement or at the close of the year is taken according to the mercantile method actual cash receipts during the year and the actual cash outlays during the year are treated in the same way as under the cash system, but to the balance thus arising, there is added the amount of the outstandings not collected at the end of the year and from this is deducted

1. (1958) S.C.J. 530 : (1958) S.C.R. 689 : (1958) 2 An.W.R. (S.C.) 1 : (1958) 2 M.L.J. (S.C.) 1.

the liabilities incurred or accrued but not discharged at the end of the year. Both the methods are somewhat rough. In some cases these methods may not give a clear picture of the true profits earned and certainly not of taxable profits. The quantum of allowances permitted to be deducted under diverse heads under section 10 (2) from the income, profits and gains of a business could differ according to the system adopted. This is made clear by defining in sub section (5) the word "paid" which is used in several clauses of sub section (2) as meaning actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under section 10. Again where the cash system is adopted, there is no question of bad debts or outstandings at all, in the case of mercantile system against the book profits some of the bad debts may have to be set off when they are found to be irrecoverable. Beside the cash system and the mercantile system, there are innumerable other systems of accounting which may be called hybrid or heterogeneous—in which certain elements and incidents of the cash and mercantile systems are combined.

But whatever method of book keeping is adopted, in the case of a trading venture for computing the true profits of the year the stock in trade must be taken into account. If the value of stock in trade is not taken into account in the ultimate result the profit or loss resulting from trading is bound to get absorbed or reflected in the stock in trade unless the value of the stock in trade remains unchanged at the commencement of the year and the end of the year. It must be remembered that under the Income tax Act, tax is levied on income, profits and gains, and not on receipts. Taxable profits therefore cannot ordinarily be deduced from cash receipts alone. If in the computation of profits of a trading venture, only the cash receipts and outgoings are taken into account, in substance the profits would be deferred, till the firm's capital outlay is completely recouped, thereby transforming what in truth are profits of the business into capital, by book keeping entries.

In this case it is necessary to consider whether the method of accounting adopted of ignoring the value of the stock-in trade may be regarded as regularly employed by the respondent firm, when it is first year of account. It is common ground that the method of accounting was not mercantile, but was wholly or primarily cash. The Income tax Officer was of the view that in the absence of stock valuation of the firm which was a wasting asset of the partnership and which was exploited for earning profits, the income of the firm could not properly be deduced and with that view the Appellate Assistant Commissioner and the Tribunal have agreed. The High Court, however, held that the maintenance of account on cash basis being a recognised method of accounting the Income-tax Officer was bound by the choice of the assessee who had adopted that system of accounting and to compute the income in accordance with that method, unless the Income tax Officer was satisfied that the assessee had not regularly adopted that system. The High Court also observed that what the Department had done was to make the assessment on the basis that the system of accounting adopted by the assessee was a mercantile system which the assessee had never adopted, and thereby computed the profits of the assessee, by taking into consideration valuation of the closing stock which was not an incident of the cash system. The Income-tax Officer had in the view of the High Court no power under the Provision to section 13.

"To force a different system on the assessee either the mercantile system or a hybrid system of cash plus valuation of closing stock."

In coming to that conclusion, in our judgment, the High Court erred. Note the facts: an amount of Rs 1,00,000 was paid by the firm for acquiring a wasting asset, which was to be exploited for the benefit of the partnership. The price paid for acquiring the asset was debited as an outgoing. At the end of the year there was a total collection of Rs 1,46,849 by the exploitation of the asset. The expenses for carrying on the business amounted to Rs 18,206. The result according to the respondent firm was a net profit of Rs 28,647. This was arrived at by posting the outgoing for acquiring its stock in trade as a proper debit, and ignoring the value of that asset at the end of the year altogether. Under the Income tax Act for the purpose of the assessment each year is a self-contained unit, and if out of the receipts the cost of the firm was to be deducted in the absence of an entry crediting the value of the asset at the end of the year, for arriving at the income of the profit of the firm

would either wholly or substantially be absorbed in the amortization of the capital value of the asset. The result of the accounting would therefore give a false picture of the partnership, however lucrative the business may in reality be. The methods of computation of taxable incomes prescribed by the Act of different kinds of income are undoubtedly highly artificial, but the Act does not compel the Income-tax Officer to accept a statement of account which is not prepared according to any recognised accounting practice.

In *Commissioner of Inland Revenue v. Cock Russell & Co., Ltd.*¹ Croom-Johnson, J., in dealing with valuation of stock-in-trade for purposes of taxation observed :

"There is no word in the statutes or Rules which deals with this question of valuing stock-in-trade. There is nothing in the relevant legislation which indicates that in computing the profits and gains of a commercial concern the stock-in-trade at the start of the accounting period should be taken in and that the amount of the stock-in-trade at the end of the period should also be taken in. It would be fantastic not to do it ; it would be utterly impossible accurately to assess profits and gains merely on a statement of receipts and payments or on the basis of turnover. It has long been recognised that the right method of assessing profits and gains is to take into account the value of the stock-in-trade at the beginning and the value of the stock-in-trade at the end as two of the items in the computation. I need not cite authority for the general proposition, which is admitted at the Bar, that for the purposes of ascertaining profits and gains the ordinary principles of commercial accounting should be applied, so long as they do not conflict with any express provision of the relevant statutes."

We have already said that in England there is no provision which compels the tax officer to adopt in the computation of income the system of accounting regularly employed by the assessee. But whatever may be the system whether it is cash or mercantile as observed by Croom-Johnson, J., in a trading venture it would be impossible accurately to assess the true profits without taking into account the value of the stock-in-trade at the beginning and at the end of the year. Reference may also be made to *Whimster & Co. v. The Commissioner of Inland Revenue*², in which Lord President Clyde observed at page 823 :

"In computing the balance of profits and gains for the purposes of Income-tax, * * * two general and fundamental common places have always to be kept in mind. In the first place, the profits of any particular year of accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income-tax Act, or of that Act as modified by the provisions and Schedules of the Acts regulating Excess Profits Duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever, is the lower ; although there is nothing about this in the taxing statutes."

Similarly in *Commissioner of Income-tax and Excess Profits Tax, Madras v. Messrs. Chari and Ram, Madura*³, Rajamannar, C.J., observed that stock-in-trade in hand is an essential item in the computation of the profits for a period.

"Profits" as observed by Fletcher Moulton, L.J., in the *Spanish Prospecting Co., Ltd.*, In re⁴.

"implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gains made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."

1. We start therefore with this fundamental definition of profits, namely, if the total assets of the business at the two dates be compared, the increase which they show at the later date as compared with the earlier date * * * represents in strictness the profits of the business during the period in question."

It is true that in that case Fletcher-Moulton, L.J., made the observations not in dealing with profit and loss account in a case in relation to taxation, but with a

1. 29 Tax. Cas. 387.

2. 12 Tax Cas. 813.

3. I.L.R. (1949) Mad. 559 : (1948) 2 M.L.J.

525.

4. L.R. (1911) 1 Ch. 92.

balance-sheet of a company intended to show the actual financial condition of a business at the end of a year. The observations however do show that in ascertaining profits what may be regarded as normal book keeping practice has to be observed. Whether in the case of trading in special classes of assets appropriate adjustments may have to be made is beside the point.

The Income tax Act makes no provision with regard to the valuation of stock. It charges for payment of tax the income profits and gains which have to be computed in the manner provided by the Income tax Act. In the case of a trading venture these profits have to be adjusted in the light of the provisions of the Income tax Act permitting allowances prescribed thereby. For that purpose it is the duty of the Income tax Officer to find out what profits the business has made according to true accountancy practice in the light of the system adopted, and thereafter to make the requisite adjustments and even appropriate modification of the rule suggested by Fletcher Moulton L.J. to ascertain the taxable profits. It is true as observed by Lord Buckmaster in *The Naval Colliery Co., Ltd v The Commissioner of Inland Revenue*¹, that the principle of determining the profits of the trade by valuing everything at the beginning and the end of the accounting period and by finding the difference may not be universally applicable in all cases and needs material modification. The formula suggested in the *Spanish Prospecting Company's case*², was sought to be applied to a case in which Excess Profits duty was assessed. The assessee, a mining Company was unable to work its colliery on account of a strike. The assessee sought to introduce into its account which normally ended on 30th June 1921, the estimated expenses for repairing the damage (which though arising in the account period was restored later) on the plea that the expenses were in the nature of liability of business and properly debitabale before they were actually incurred. The House of Lords rejected that contention. It was in this context that Lord Buckmaster observed that the accountancy rules applicable to wise and prudent trading could not be used in connection with the working of a mining lease.

These observations do not affect the true character of the profits of a business. Adjustments may have to be made in the principle having regard to the special character of the assets, the nature of the business and the appropriate allowances permitted in order to arrive at the taxable profits. They do not support the proposition that in the case of a trading venture you can arrive at the true profits of a year by ignoring altogether the valuation of the stock in trade at the end of the year while debiting its value at the commencement of the year as an outgoing for determination of the profits by ignoring the valuation of the stock at the end of the year and debiting the value of the assets at the commencement of the year would not give a true picture of the profit for the year of account.

There is no warrant in this case for assuming that the Revenue Authorities and the Tribunal had sought to displace the method of accountancy adopted by the assessee. By applying the Proviso to section 13 they made the computation upon the basis and in the manner in which in their opinion profits would be properly deduced. That they were entitled to do. We are therefore of the view that the High Court was in error in holding that because the assessee had maintained his accounts in the cash system it was not open to the Income tax Officer to add to the receipts from the business the value of the stock in trade at the end of the year for the purpose of properly deducing the profits of the business for the year in question.

The appeal therefore must be allowed and the answer to the question referred to the High Court will be in the affirmative. The Commissioner will be entitled to his costs in this Court as well as in the High Court.

V S

Appeal allowed

THE SUPREME COURT OF INDIA.

PRESENT:—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

S. S. Gadgil

.. Appellant.*

v.

Lal & Co.

.. Respondent.

Income-tax Act, (XI of 1922), section 34 (1) proviso (iii) and section 43—Limitation—Agent of non-resident—Back assessment—Notice barred under existing law—Extension of time limit by amendment—No determinable point of time between last duty under old law and commencement of new law—Notice, whether saved from bar of limitation—Assessment—Nature of—Whether an adjudication of a civil dispute.

Interpretation of statutes—Retrospectivity—Bar of proceedings before amendment—Subsequent extension of time-limit, if revives the barred proceedings—Rule against implying retrospectivity greater than express provision.

Finance Act, 1956 (Central Act XVIII of 1956), sections 18 and 25, General Clauses Act, 1897 (Central Act (X of 1897), section 5 (3).

The assessee, a commission agent, had business connection with certain non-residents. The Income-tax Officer issued a notice on 12th March, 1957, calling on the assessee to show cause why he should not be dealt with as a statutory agent of the non-residents under section 43 of the Indian Income-Tax Act, 1922. The assessee filed his objections, but the Income-tax Officer issued notice to the assessee on 27th March, 1957, under section 34 of the Act for making assessments on him as the non-residents' agent for the assessment year 1954-55. The assessee objected on the ground that more than one year had elapsed after the end of the year of assessment and the proceedings under section 34 were hence time barred. The Officer rejected the contention on the score that the time-limit was extended by the Finance Act of 1956. A petition for writ filed by the assessee to restrain the Officer from further proceedings was ordered. In the appeal filed by the Income Tax Officer against the issue of writs

Held, that in the course of assessment to income-tax for the year 1954-55, the relevant law applicable prescribed that a notice of assessment or re-assessment against a person deemed to be an agent under section 43 could not be issued after the expiry of one year from the end of the assessment year. That period expired on 31st March, 1956, and after that date no notice could be issued, relying upon the law as it stood before the amendment of section 34.

Section 18 of the Finance Act, 1956, which amended section 34 of the Indian Income-tax Act, 1922, was not given retrospective operation before 1st April, 1956. The right to issue a notice under the earlier Act came to an end before the new Act came into force. The application of the amended Act is subject to the principle that, unless otherwise provided, if the right to act under the earlier statute has come to an end, it could not be revived by the subsequent enactment which extended the period of limitation. There was, undoubtedly, no determinable point of time between the expiry of the earlier Act and the commencement of the new Act, but that would not affect the application of this rule:

The Legislature has given to section 18 of the Finance Act, 1956, only a limited retrospective operation, i.e., upto 1st April, 1956 only. That provision must be read subject to the rule that in the absence of an express provision or clear implication the Legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned.

A proceeding for assessment is not a suit for adjudication of a civil dispute and the period prescribed by section 34 for assessment is not a period of limitation.

Appeal from the Judgment and Order dated 1st April, 1958, of the former Bombay High Court in Miscellaneous Application No. 327 of 1957.

K. N. Rajagopal Sastry, Senior Advocate (R. N. Sachthy, Advocate, with him), for Appellant.

Bishan Narain, Senior Advocate, (S. P. Mehta, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Messrs. Lal & Company hereinafter called the assessee carry on business in Bombay as commission agents. In the course of assessment proceedings for the year 1954-55 the assessee's books of account were examined by the Income-tax Officer and it was noticed that the assessee had business connections with certain non-resident parties. On 12th March, 1957, the Income-tax Officer issued a notice calling upon the assessee to show cause why in respect of the assessment year 1954-55 the assessee should not be treated under section 43 of the Indian Income-tax Act,

1922, as an agent in respect of twenty five non resident parties named in the notice. The assessee denied that he had "direct dealings" with any non resident party and that in any event the proposed action was barred because the period prescribed for initiation of proceeding had expired and requested the Income tax Officer to drop the proceeding. The Income-tax Officer, B III Ward, Bombay, issued on 27th March, 1957, a notice under section 34 of the Indian Income tax Act for assessment of the assessee as an agent of the twenty five named non resident parties. The assessee submitted a return showing his income as "nil". The Income-tax Officer held that the transactions disclosed from the books of account of the assessee clearly showed that the assessee "had regular business connection with" non resident parties, that through the assessee those non resident parties were receiving income, profits and gains and section 43 was clearly applicable to the assessee there being definite business connection between the assessee and the named non residents. He therefore treated the assessee as agent of the non resident parties under section 43 of the Act.

The Income tax Officer also rejected the contention of the assessee that action under section 34 was barred at the date of the notice issued to the assessee. Relying upon the First Proviso to section 34 (1) (b) (iii) inserted by the Finance Act, 1956 the Income tax Officer held that the Legislature had by amendment extended the "time limit in clear and express terms so as to cover" action under section 34 against a person on whom the assessment or re assessment is to be made as an agent of a non resident person under section 43 of the Act for the assessment year 1954-55 and accordingly assessed the income of the assessee at Rs 60,684, estimating the income of the parties residing outside the taxable territories, in the absence of accounts to be Rs 50,000.

The assessee then filed a petition under Article 226 of the Constitution in the High Court of judicature at Bombay praying that a writ in the nature of *mandamus* or *prohibition* do issue restraining and prohibiting the Income-tax Officer from giving effect to or taking any steps or proceedings by way of recovery or otherwise in pursuance of the orders of assessment. The assessee pleaded, *inter alia*, that the proceedings for assessment under section 34 of the Act commenced by the Income-tax Officer after the expiry of one year from the end of the assessment year 1954-55 were without the authority of law. The High Court of Bombay, following its earlier judgment in *S C Prashar v Vasanten Dwarkadas*¹, held that at the date when the notice was issued, by reason of the Proviso which was in operation under section 34 (1) in respect of the assessment year 1954-55 the notice was out of time and that the period provided thereby could not be extended by the Finance Act of 1956 so as to authorise the Income tax Officer to issue a notice for assessment or re assessment of the assessee as statutory agent of a party, residing outside the taxable territory. In the view of the High Court the notice dated 27th March 1957, was invalid and a valid notice being a condition precedent to the exercise of jurisdiction under section 34, the proceeding under section 34 was not maintainable. Against the order of the High Court issuing writs prayed for by the assessee, with certificate of fitness this appeal is preferred by the Income tax Officer, Bombay.

In order to appreciate the contention raised by the assessee and which has found favour with the High Court, it is necessary to refer to the relevant provisions of section 34, as they stood before the section was amended by the Finance Act, 1956. The relevant clauses prescribing the period within which notice may be issued read as follows:

- "(1) (a) If— : : : : :
(b) : : : : :

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains or recompute the loss or depreciation allowance

Provided that—

- | | | | | | | |
|------|---|---|---|---|---|---|
| (i) | * | * | * | * | * | * |
| (ii) | * | * | * | * | * | * |

(iii) Where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted."

By section 18 of the Finance Act, 1956, section 34 was extensively amended and clause (iii) of the Proviso was substituted by the following Proviso :

" Provided further that the Income-tax Officer shall not issue a notice under this sub-section for any year after the expiry of two years from that year if the person on whom an assessment or re-assessment is to be made in pursuance of the notice is a person deemed to be an agent of non-resident person under section 43."

Initially, a notice of assessment or re-assessment under section 34 (1) against a person deemed to be an agent of a non-resident person under section 43 could not be issued after the expiry of one year from the end of the year of assessment ; under the amended section this period was extended to two years from the end of the relevant assessment year. In the course of assessment to income-tax for the year 1954-55 the relevant law applicable prescribed that a notice of assessment or re-assessment against a person deemed to be an agent under section 43 could not be issued after the expiry of one year from the end of the assessment year. That period expired on 31st March, 1956, and after that date no notice could be issued, relying upon the law as it stood before amendment for assessment or re-assessment treating the assessee as an agent of a non-resident under section 43. But the Income-tax Officer sought recourse to the amended provision which gave him a period of two years from the end of the assessment year, for initiating assessment proceedings, and the authority of the Income-tax Officer to so act is challenged by the assessee.

Section 18 of the Finance Act, 1956, is, it is common ground, not given retrospective operation before 1st April, 1956. The question then is, whether the Income-tax Officer may issue a notice of assessment to a person as an agent of a non-resident party under the amended provision when the period prescribed for such a notice had before the amended Act came into force expired. Indisputably the period for serving a notice of re-assessment under the unamended section had expired, and there was in the Act as it then stood, no provision for extending the period beyond the end of one year from the year of assessment. The Income-tax Officer could therefore commence a proceeding under section 34 on 27th March, 1957, only if the amended section applied and not otherwise. The amending Act came into force *after* the period provided for the issue of a notice under section 34 before it was amended had expired. It is true that there was no determinable point of time between the expiry of the prescribed time within which the notice could have been issued against the assessee under section 34 Proviso (iii) before it was amended. But there was no overlapping period either. *Prima facie*, on the expiry of the period prescribed by section 34 as it originally stood, there was no scope for issuing a notice unless the Legislature expressly gave power to the Income-tax Officer to issue notice under the amended section notwithstanding the expiry of the period under the unamended provision or unless there was overlapping of the period within which notice could be issued under the old and the amended provision. But Counsel for the Commissioner submitted that at no time was the Income-tax Officer bereft of authority to issue a notice under section 34 of the Indian Income-tax Act, 1922. He submitted that till the midnight of 31st March, 1956, notice could be issued in exercise of the powers conferred by section 34 Proviso (iii) before it was amended, and notice of assessment or re-assessment could also be issued under the amended provision immediately thereafter in exercise of the powers conferred by section 18 of the Finance Act, 1956. Counsel relied upon the rule contained in section 5 (3) of the General Clauses Act that unless the contrary is expressed, a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement. It was submitted that this is merely a statutory recognition of the rule which is well-settled that where a statute names a date on which it shall come into operation, it shall be deemed to come into force immediately

on the expiration of the previous day and the law does not take into consideration fractions of a day

Reliance was placed by counsel upon *Tomlinson v Bullock*¹ and *English v Chiff*². In *Tomlinson's Case*¹, the question was whether an order of affiliation could be made on an application made in respect of a child born at any time of the day on 10th August 1872 under the Bastardy Act, 35 and 36, Vict., c. 65. In an application made for an order of affiliation, it was held that the order could competently be made in respect of a child born at any time of the day on the 10th of August 1872, because the Act in the contemplation of law for this purpose came into effect from the commencement of the day on which it received the royal assent, and that normally an Act which comes into operation becomes law as soon as it commences. In *English v Chiff*², it was held by the Court of Chancery that the trustees under a deed of settlement dated 13th May, 1892, who stood possessed of an estate during the term of twenty one years from the date of settlement upon trust to apply the rents and profits mentioned therein and who were authorised at the expiration of the said period to sell the estate could competently sell it and their action was not liable to be challenged as infringing the rule of perpetuity. It was held in that case that the determination of the term of twenty one years and the commencement of the trust for sale arising at one and the same moment, the trust was not void for remoteness on the ground that it was limited to take effect at the expiration of the term. Neither of these cases has, in our judgment any application to the principle applicable in the present case. The power to issue a notice under the unamended Act came to an end on 31st March, 1956. Under that Act no notice could thereafter be issued. It is true that by the amendment, made by section 18 of the Finance Act, 1956, a notice could be issued within two years from the end of the year of assessment. But the application of the amended Act is subject to the principle that unless otherwise provided if the right to act under the earlier statute has come to an end it could not be revived by the subsequent amendment which extended the period of limitation. The right to issue a notice under the earlier Act came to an end before the new Act came into force. There was undoubtedly no determinable point of time between the expiry of the earlier Act and the commencement of the new Act, but that would not, in our judgment, affect the application of this rule.

Reliance was also placed by Counsel for the Commissioner upon the rule which has prevailed in the Supreme Court of the United States of America that

"a new statute should be construed as a continuation of the old one with the modifications contained in the new one although it formally repeals the old statute where it re-enacts its substantial provisions and the two statutes are almost identical. *Bear Lake and R. R. Water Works and Irrigation Company and Jarvis Conklin Mortgage Trust Company v William Garland and Corey Brothers and Co.*"

It appears to have been recognised in the Supreme Court of the United States of America in *Pacific Mail S S Co v Jolyfee*³, that repeal in terms of a former statute does not necessarily indicate an intention of the Legislature thereby to impair rights which had arisen under the Act which was repealed. As the provisions of the new Act took effect simultaneously with the repeal of the old one, the Supreme Court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old Act, instead of abrogating or annulling them and re-enacting the same as a new and original Act. Apart from the question whether the rule so enunciated is applicable to the interpretation of Indian statutes, in this case we are not concerned with re-enactment of a statute. The statute abrogates one rule of limitation, and enacts another rule with a limited retrospective operation. To such a case the rule enunciated by the Supreme Court of America assuming it applies, attributing to the Legislature an intention to continue in force the provisions of the old Act, with a modification, so as to give to the new statute in substance operation retrospectively from the date on which the old statute was enacted, can have no application. We do not think that any such intention

1 (1879) L.R. 4 Q.B.D. 230

2 L.R. (1914) 2 Ch. D. 376

3 164 U.S. 1

4 69 U.S. 2, Wall 459

may be attributed to the Legislature in enacting section 18 of the Finance Act, 1956, so as to make it the basis of a liability to taxation after the expiry of the period prescribed in that behalf by Legislature.

Counsel also submitted that section 34 lays down a rule of limitation for commencing an action for assessment or re-assessment, and that in the absence of an express provision to the contrary, a statute of limitation in operation at a given time governs all proceedings from the moment of its enactment even though the cause of action on which the proceeding was based came into existence before the Act was enacted. Equating a proceeding under section 34 of the Indian Income-tax Act with a suit or a proceeding in a civil Court, Counsel said that the law of limitation being a law of procedure, assessment proceedings including proceedings for reassessment are governed by the law in force at the date on which they are instituted and that the rule that the repeal of a statute without express words or clear implication in the repealing statute, cannot take away a right vested in a party acquired under the repealed statute when it was in force, is a rule of prescription and not of procedure, and notwithstanding general observations to the contrary in certain decisions applies only to those actions in which by the determination of the period prescribed a right to institute an action for possession of property is extinguished. Counsel relied in support of the plea on *Baleswar v. Latafat*¹. It is unnecessary to dilate upon this argument in any detail, or to enter upon an analysis of the numerous cases which were mentioned at the Bar to determine whether the rule that without an express provision, or a clear implication arising from the amending statute rights acquired under the repealed statute by the determination of the period of the limitation prescribed thereby cannot be deemed to be revived, applies to suits for possession only. It may be sufficient to make two comments on the argument. The rule has in fact been applied to suits other than suits for possession : e.g., *Mahomed Mehdi Faya v. Sakinabai*² (a suit for restitution of conjugal rights) ; *M. Krishnaswami Naicker v. A. Thiruvengada Mudaliar*³ (a suit for recovery of a debt) ; *Shambhoonath Saha v. Gurchurn Lahiri*⁴ (an application for execution) ; and *Nepal Chandra Roy Chowdhury v. Niroda Sundari Ghose*⁵ (an application for setting aside an *ex-parte* decree). Again soon after it was delivered the authority of *Baleswar's case*¹, was weakened by the judgment in *Jagdish v. Saligram*⁶, where the Court doubted the correctness of the earlier view.

A proceeding for assessment is not a suit for adjudication of a civil dispute. That an income-tax proceeding is in the nature of a judicial proceeding between contesting parties, is a matter which is not capable of even a plausible argument. The Income-tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State: they are administrative Authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the proceeding with the character of an action between the citizen and the State : *The Commissioner of Inland Revenue v. Sneath*⁷ and *Shell Company of Australia, Ltd. v. Federal Commissioner of Taxation*⁸.

Again the period prescribed by section 34 for assessment is not a period of limitation. The section in terms imposes a fetter upon the power of the Income-tax Officer to bring to tax escaped income. It prescribes different periods in different classes of cases for enforcement of the right of the State to recover tax. It was observed by this Court in *Ahmedabad Manufacturing and Calico Printing Co., Ltd. v. S. G. Mehta, Income-tax Officer and another*⁹ :

1. (1948) I.L.R. 24 Pat. 249.

2. (1913) I.L.R. 37 Bom 393.

3. A.I.R. 1935 Mad. 245; 68 M.L.J. 63.

4. (1880) I.L.R. 5 Cal. 894.

5. (1912) I.L.R. 39 Cal. 506.

6. (1945) I.L.R. 24 Pat. 391.

7. (1932) 17 T.C. 149, 164.

8. L.R. (1931) A.C. 275.

9. (1963) 48 I.T.R. (S.C. section) 154, 171 :

(1963) 1 S.C.J. 491; (1963) 1 I.T.J. 328.

"It must be remembered that if the Income-tax Act prescribed a period during which tax due in any particular assessment year may be assessed, then on the expiry of that period the Department cannot make an assessment. Where no period is prescribed the assessment can be completed at any time but once completed it is final. Once a final assessment has been made, it can only be reopened to rectify a mistake apparent from the record (s 35) or to reassess where there has been an escape-ment of assessment of income for one reason or another (s 34). Both these sections which enable re-opening of back assessments provide their own periods of time for action but all these periods of time, whether for the first assessment or for rectification, or for re-assessment, merely create a bar when that time passed against the machinery set up by the Income tax Act for the assessment and levy of the tax. They do not create an exemption in favour of the assessee or grant an absolution on the expiry of the period. The liability is not enforceable but the tax may again become exigible if the bar is removed and the taxpayer is brought within the jurisdiction of the said machinery by reason of a new power. This is, of course subject to the condition, either expressly or by clear implication. If the language of the law has that clear meaning, it must be given that effect and where the language expressly so declares or clearly implies it, the retrospective operation is not controlled by the commencement clause."

Counsel for the Commissioner sought to derive some support from *Income-tax Officer, Companies District-I, Calcutta and another v. Calcutta Discount Company Ltd*¹ in which Chakravarti, C.J., dealing with effect of the Income-tax and Business Profits Tax (Amendment) Act, 1948, observed:

"The plain effect of the substitution of the new section 34 with effect from 30th March, 1948, is that from that date the Income-tax Act is not to be read as including the new section as a part thereof and if it is to be so read, the further effect of the express language of the section is that so far as cases coming within clause (a) of sub-section (1) are concerned all assessment years ending within eight years from 30th March, 1948 and from subsequent dates, are within its purview and it will apply to them, provided the notice contemplated is given within such eight years. What is not within the purview of the section is assessment year which ended before eight years from 30th March, 1948."

But it may be recalled that the amending Act of 1948 with which the Court was concerned in *Calcutta Discount Company's Case*¹ came into force on 8th September, 1948, but section 1 (2) prescribed that the amendment in section 34 of the Income-tax Act, 1922, shall be deemed to have come into force on 30th March, 1948, and the period under the unamended section within which notice could be issued under section 34 (3) against the assessee company ended on 31st March, 1951. Before that date the amending Act came into operation, and at no time had the right to re-assess become barred.

In considering whether the amended statute applies, the question is one of interpretation, i.e., to ascertain whether it was the intention of the Legislature to deprive a taxpayer of the plea that action for assessment or re-assessment could not be commenced, on the ground that before the amending Act became effective, it was barred. Therefore, the view that even when the right to assess or re-assess has lapsed on account of the expiry of the period of limitation prescribed under the earlier statute, the Income-tax Officer can exercise his powers to assess or re-assess under the amending statute which gives an extended period of limitation, was not accepted in *Calcutta Discount Company's case*².

As we have already pointed out, the right to commence a proceeding for assessment against the assessee as an agent of a non-resident party under the Income-tax Act before it was amended, ended on 31st March, 1956. It is true that under the amending Act by section 18 of the Finance Act, 1956, authority was conferred upon the Income-tax Officer to assess a person as an agent of a foreign party under section 43 within two years from the end of the year of assessment. But authority of the Income-tax Officer under the Act before it was amended by the Finance Act of 1956 having already come to an end, the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act. This will be so, notwithstanding the fact that there has been no determinable point of time between the expiry of the time provided under the old Act and the commencement of the amending Act. The Legislature has given to section 18 of the Finance Act, 1956, only a limited retrospective operation i.e., upto 1st April, 1956, only. That provision must be read subject to the rule that in the absence of an express provision or clear implication, the Legis-

lature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorise the Income-tax Officer to commence proceedings which before the new Act came into force had by the expiry of the period provided, become barred.

The appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Delhi and Rajasthan, New Delhi .. *Appellant**

v.

Anant Rao B. Kamat

.. *Respondent.*

Income-tax Act (XI of 1922), section 16 (2)—Dividend—Grossing up—Rate applicable to the total income of the company—Computation—Rebate allowed to company under Part B States (Taxation Concessions) Order—Whether to be excluded—Rebate, whether exclude rebate under Concessions Order—Part B States (Taxation Concessions) Order, 1950, paragraph 3 (v).

The assessee, for the assessment years 1951-52 and 1952-53, claimed that the dividends received by him from the two companies should be grossed up under section 16 (2) of the Income-tax Act with out taking into consideration the rebate allowed to the companies under the Part B States (Taxation Concessions) Order, 1950. The Income-tax Officer disallowed the grossing up at the rate applicable under the Indian Income-tax Act and the Finance Act but allowed at the 'State rate of tax' existing before the appointed date under paragraph 3 (v) of the Concessions Order, 1950. The Appellate Commissioner affirmed the order of the Officer. The Tribunal, however, reversed the order of the Department and upheld the claim of the assessee. The High Court, in reference proceedings, answered in favour of the assessee. The Department appealed to the Supreme Court,

Held : In grossing up the dividends under section 16 (2) of the Act, the rate applicable to the total income of the companies is without taking into consideration the rebate allowed to the companies under the Concession Order of 1950. Section 16 (2) of the Act applies the rate of the year in which the dividend is paid and not of the year when the profits were made by the company.

The Concession Order remits what would otherwise be the proper tax leviable under the Finance Act, read with the Indian Income-tax Act. The word 'rebate' is an apt word to use in respect of a remission. The meaning of the word 'rebate' in section 16 (2) of the Act cannot be limited to a rebate granted under the Indian Finance Act. The word is not qualified and is wide enough to include any rebate which may be granted by other statutory orders. The form of the certificates to be furnished by the principal officer of a company under the Act and Rules cannot change the meaning of the word.

Appeals from the Judgment and Order dated 3rd February, 1962, of the Rajasthan High Court in D. B. Civil Reference No. 13 of 1958.

S. K. Kapur, Senior Advocate (R. N. Satchthey, Advocate, with him) for Appellant.

N. A. Palkhivala, Senior Advocate (S. P. Mehta, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—These are appeals by the Commissioner of Income-tax on certificates granted by the Rajasthan High Court under section 66-A (2) of the Indian Income-tax Act, 1922 (XI of 1922), hereinafter referred to as the Act, against the judgment of the High Court in a consolidated Reference under section 66 (1) of the Act. The High Court answered the question, reproduced below, in the affirmative. The Reference was made by the Income-tax Appellate Tribunal in the following circumstances.

The respondent, Anant Rao B. Kamat, hereinafter referred to as the assessee, had received in the previous years (1950-51 and 1951-52) dividends from two com-

panies, Associated Stone Industries (Kotah) Ltd, and Rajputana Mining Agencies Ltd. For the assessment years 1951-52, and 1952-53, the assessee claimed before the Income-tax Officer that the dividends received by him should be 'grossed up' under section 16 (2) of the Act, without taking into consideration the rebate allowed to the said companies under the Part B States (Taxation Concessions) Order, 1950, hereinafter called the Concession Order. According to the assessee, on a true construction of section 16 (2) of the Act, the rate applicable to the total income of the said companies was the rate prescribed by the relevant Indian Finance Acts. The Income tax Officer disallowed the grossing up at the Indian rate but allowed at the State rate, defined by paragraph 3 (v) of the Concession Order. The Appellate Assistant Commissioner upheld the order of the Income-tax Officer, but the assessee succeeded before the Income-tax Appellate Tribunal. On the application of the Commissioner of Income-tax, the Tribunal referred the following question to the High Court:

"Whether the appropriate portion of the dividend received by the assessee from either of the said two companies in the financial year 1950-51/1951-52 is to be increased at the rate applicable to the total income of the respective companies for the financial year 1950-51, 1951-52 and without regard to any benefit conferred by the Taxation Concessions Order, 1950 that the companies would get in the matter of payment of tax by them on their profits accruing or arising to them in a Part 'B' State and assessable for the assessment year 1950-51/1951-52?"

The High Court, after asking for a supplementary statement of the case, answered, as we have already said, in favour of the assessee. The learned Counsel for the appellant has contended before us that the rate applicable to the total income of the said companies was the rate as finally applied after taking into consideration the effect of the Concession Order. He has further urged that the word 'rebate' occurring in section 16 (2) does not include the relief given to the said companies under the Concession Order, for the Concession Order is not concerned with granting rebate but is concerned with the determination of the tax payable. In this connection, he relied on section 60-A of the Act under which the Concession Order was made, and said that this section enabled the Central Government to make an exemption, reduction in rate or other modification in respect of income-tax but not to grant a rebate. The learned Counsel for the respondent controverted these arguments and supported the judgment of the High Court.

Before addressing ourselves to the contentions at the Bar, it is necessary to reproduce the relevant statutory provisions. These read thus:

"Section 16 (2) —For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him, and shall be increased to such amount as would, if income-tax (but not super tax) at the rate applicable to the total income of the company (without taking into account any rebate allowed or additional income-tax charged) for the financial year in which the dividend is paid, credited or distributed or deemed to have been paid, credited or distributed, were deducted therefrom, be equal to the amount of the dividend:

Provided that when the sum out of which the dividend has been paid, credited or distributed or deemed to have been paid, credited or distributed includes—

- (i) any profits and gains of the company not included in its total income or
- (ii) any income of the company on which income tax was not payable, or

(iii) any amount attributable to any allowance made in computing the profits and gains of the company,

the increase to be made under this section shall be calculated only upon such proportion of the dividend as the said sum after deduction of the inclusions enumerated above bears to the whole of that sum.

Section 18 (5) —Any deduction made and paid to the account of the Central Government in accordance with the provisions of this section and any sum by which a dividend has been increased under sub-section (2) of section 16 shall be treated as a payment of income-tax or super tax on behalf of the person from whose income the deduction was made, or of the owner of the security or of the shareholder, as the case may be, and credit shall be given to him therefor on the production of the certificate furnished under sub-section (9) or section 20, as the case may be, in the assessment, if any, made for the following year under this Act.

Provided

Section 60-A.—Power to make exemption, etc., in relation to merged territories or to the territories which immediately before the 1st November, 1956 were comprised in any Part B State.—If the Central Government considers it necessary or expedient so to do for avoiding any hardship or anomaly, or removing any difficulty, that may arise as a result of the extension of this Act to the merged territories or the territories which immediately before the 1st November, 1956, were comprised in any Part B State, the Central Government may, by general or special order, make an exemption, reduction in rate or other modification in respect of income-tax in favour of any class of income, or in regard to the whole or any part of the income of any person or class of persons :

Provided that the power conferred by this section shall not be exercisable in the case of merged territories and the territories which immediately before the 1st November, 1956, were comprised in Part B States other than the State of Jammu and Kashmir, after the 31st day of March, 1955, and, in the case of the State of Jammu and Kashmir after the 31st day of March, 1959, except for the purpose of rescinding an exemption, reduction or notification, already made.

Para. 3 (iii) of the Concession Order.—The expression “Indian rate of tax” means the rate determined by dividing the amount of income-tax and super-tax payable in the taxable territories on the total income for the year in question in accordance with the rates prescribed by the relevant Finance Act of the Central Government, by the amount of such total income.

Para. 3 (v) of the Concession Order.—The expression ‘State rate of tax’ means the rate determined by dividing the amount of income-tax and super-tax payable on the total income according to the rate of tax in force in the State immediately before the appointed day, or for the year in question, as the case may be, by the amount of such total income and where under any State law, the rates of tax in force in the State are prescribed with reference to the total income including agricultural income, the State rate of tax shall be the rate determined by dividing the amount of income-tax and super-tax on the total income including the agricultural income without taking into account any reduction of tax allowed on the agricultural income by the State law by the amount of such total income :

Explanation.—Where there was no State law relating to charge of income-tax and super-tax the rates of income-tax and super-tax in force in that State immediately before the appointed day shall, for the purposes of this clause, be deemed to be the rates specified in the Schedule.

Para. 6 of the Concession Order.—*Income of a previous year which does not all under paragraph 5 :—*The income, profits and gains of any previous year ending after the 31st day of March, 1949, which does not fall within paragraph 5 of this Order shall be assessed under the Act for the year ending on the 31st day of March, 1951, or on the 31st day of March, 1952, as the case may be, and the tax payable thereon shall be determined as hereunder :

In respect of so much of the income, profits and gains included in the total income as accrue or arise in any State other than the States of Patiala and East Punjab States Union and Travancore-Cochin—

(i) the tax shall be computed (a) at the Indian rate of tax and (b) at the State rate of tax in force immediately before the appointed day :

(ii) where the amount of tax computed under sub-clause (a) of clause (i) is less than or is equal to the amount of tax computed under sub-clause (b) of clause (i), the amount of the first-mentioned tax shall be the tax payable ;

(iii) where the amount of tax computed under sub-clause (a) of clause (i) exceeds the tax computed under sub-clause (b) of clause (i) ; the excess shall be allowed as a rebate from the first mentioned tax and the amount of the first-mentioned tax as so reduced shall be the tax payable.

Para. 6-A of the Concession Order.—*Income, profits and gains chargeable to tax in the assessment years 1952-53, 1953-54 and 1954-55.* The income, profits and gains of any previous year which is a previous year for the assessment for the year ending on the 31st day of March, 1953, 1954 and 1955, shall be charged to tax at the Indian rates of tax ; provided that from the tax so computed, there shall be allowed in each year, rebate at the percentage thereof specified thereunder :

In respect of so much of the income, profits and gains as accrue or arise—

(a) In the States of Saurashtra, Madhya Bharat or Rajasthan, to any assessee, at the rate of 40 per cent. 20 per cent. and 10 per cent., respectively for the assessment for the year ending on the 31st day of March, 1953, 1954 and 1955.....”

The scheme underlying section 16 (2) and section 18 (5) seems to be this. Under section 16 (2) the dividends are grossed up and under section 18 (5) any sum by which a dividend is increased under section 16 (2) is treated as payment of income-tax on behalf of the share-holder. In this setting, let us examine what is the true construction of section 16 (2) of the Act. It is common ground that ‘grossing up’ has to be effected in this case. The real point of controversy between the parties is regarding the rate at which it is to be done. The learned Counsel for the appellant

relying on the decision of this Court in *Rajputana Agencies Ltd v Commissioner of Income tax*¹, urged that the same meaning should be attributed to the expression 'rate applicable to the total income of the company' in section 16 (2) as was attributed by this Court to the same expression occurring in sub-clause (b) of clause (i) to the second Explanation to Proviso to Paragraph B of Part I of the First Schedule to the Indian Finance Act, 1951. We are unable to accept this argument. It is true that the same expression occurs in section 16 (2) and the sub-clause above referred to, but as pointed out by the High Court, the words 'without taking into account any rebate allowed or additional income-tax charged' occur in section 16 (2) and not in the said sub-clause, and effect must be given to these words. If we ignore these words we would be rewriting section 16 (2). It will be noticed that section 16 (2) applies the rate of the year in which the dividend is paid, etc., and not of the year when the profits were made by the company. The Legislature has devised a mechanical test which has to be applied regardless of the hardship or the benefit which may accrue to an assessee. Therefore, we agree with the High Court that though the rate applicable is the rate which is actually applied, rebate if any allowed to a company has not to be, as directed by section 16 (2), taken into account.

This takes us next to the point that benefit given by the Concession Order is not a rebate at all. We cannot accept this contention. The Concession Order itself uses the word 'rebate' in Paras 5, 6 and 6-A. Indeed, though it may be possible to urge something while dealing with Para. 6, no argument is possible regarding Para 6 A, for it expressly says that 'there shall be allowed in each year rebate at the percentage thereof specified hereunder'. The learned Counsel for the appellant laid great stress on the language of Para. 6 of the Concession Order. He said that clause (i) directed the computation of tax and clause (ii) was equally directing computation of tax, and that in this context the word 'rebate' has been loosely used. We are unable to say that the word 'rebate' has been loosely used. In Para 6-A the meaning is clear and the word 'rebate' must have the same meaning in both paras. Further, but for the provision of the Concession Order, the said companies would have been taxed at the rates prescribed by the relevant Finance Act. The Concession Order remits what would otherwise be the proper tax leviable under the Finance Act, read with Indian Income tax Act. The word 'rebate' is an apt word to use in respect of a remission.

That a rebate as such can be directed to be allowed under section 60-A of the Act seems clear to us. The words 'exemption' or other modification are wide enough to enable the Central Government to give rebate such as has been allowed under the Concession Order.

During the course of the hearing of the connected Civil Appeal in *M/s Maganlal Sankalchand v The Commissioner of Income-tax, New Delhi*², the learned Counsel for the Commissioner of Income-tax raised two additional arguments. First, he urged that the word 'rebate' in section 16 (2) only related to rebate granted under the Indian Finance Act and not any rebate granted under the Concession Order. He further referred us to rule 14 of the Indian Income-tax Rules, which prescribes the certificate to be furnished by the principal officer of a company under section 20 of the Act. The relevant portion of the certificate is as follows:

"1. We certify —

- | | |
|---|---|
| (A) (1) that the Company estimates that out of the said period, | |
| (a) | per cent., is chargeable at full Indian rate, |
| (b) | per cent., is chargeable at the reduced rate of |
| Part B State), and | (Name of |

Regarding his first contention, we are unable to limit the meaning of the word 'rebate' to rebate granted under the Indian Finance Act. The word 'rebate' is

not qualified and is wide enough to include any rebate which may be granted by other statutory orders. The form of the certificate referred to us which mentions reduction of rate cannot change the meaning of the word 'rebate'.

In the result, we agree with the High Court that the answer to the question referred should be in the affirmative. The appeals accordingly fail and are dismissed with costs. One set of hearing fees.

V. S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ.

Commissioner of Sales-tax, U. P.

.. *Appellant**

v.
Bijli Cotton Mills, Hathras, U.P.

.. *Respondent.*

Tax Reference—Law applicable in answering question referred—Amendment of law retroactively by Legislature—Effect.

U. P. Sales Tax Act (XV of 1948)—Reference to High Court by Judge (Revisions) Sales Tax question as to liability of dealer to pay sales tax—Subsequent amendment of the statute with retrospective effect fixing the liability—Law to be applied.

Undoubtedly the Tribunal called upon to decide a taxing dispute must apply the relevant law applicable to a particular transaction to which the problem relates, and that law normally is the law applicable as on the date on which the transaction in dispute has taken place. If the law which the Tribunal seeks to apply to the dispute is amended, so as to make the amended law applicable to the transaction in dispute, it would be bound to decide the question in the light of the law as amended. Similarly when the question has been referred to the High Court and in the meanwhile the law has been amended with retroactive operation, it would be the duty of the High Court to apply the law so amended if it applies. By taking notice of the law which has been substituted for the original provision the High Court is giving effect to legislative intent and does no more than what must be necessarily implicit in the question referred by the Tribunal, provided the question is couched in terms of sufficient amplitude to cover the enquiry into the question in the light of the amended law, and the enquiry does not necessitate investigation of fresh facts. If the question is not so couched as to invite the High Court to decide the question in the light of the law as amended or if it necessitates investigation of facts which have not been investigated, the High Court may refuse to answer the question. Application of the relevant law to a problem raised by the Reference before the High Court is not normally excluded merely because at the date when the Tribunal decided the question the relevant law was not or could not be brought to its notice. There is nothing so peculiar in the nature of a Reference under the Indian Income-tax Act or the Sales Tax Acts that in deciding it the High Court is restricted to the application of the law which has been superseded by legislation since the date when the Reference was made by the Tax Tribunal and is obliged to refuse to apply the law which by legislative direction has to be applied to a particular transaction which is the subject-matter of the Reference.

Appeal by Special Leave from the Judgment and Decree, dated 17th December, 1958 of the Allahabad High Court in *Mis. Case No. 152 of 1952.*

C. B. Agarwala, Senior Advocate, (*C. P. Lal*, Advocate, with him), for Appellant.

S. K. Kapur, Senior Advocate, (*S. K. Mehta* and *K. L. Mehta*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—*Bijli Cotton Mills*—respondent in this appeal—is a manufacturer of cotton yarn and is registered as a dealer under the U. P. Sales Tax Act (XV of 1948). Under the U. P. Sales Tax Act (XV of 1948) which came into force on April 1, 1948, sales tax became payable on sales of diverse commodities including cotton yarn at a uniform rate of three pies in a rupee. By Act (XXV of 1948), section 3-A was incorporated in Act (XV of 1948) conferring upon the Provincial Government power to declare by notification that the proceeds of sale of any goods or class of goods shall not be included in the turnover of any dealer except at such single point in the series of sales by successive dealers as the State Government may specify. By

section 7 as amended by Act (XXV of 1948) a dealer had the option to submit his return on the basis of the turnover of the sales in the previous year or on the basis of turnover of the sales in the current year. The respondent company opted to be assessed on the basis of the turnover of the previous year ending March 31, 1948.

In exercise of the power under section 3 A of the Act the Government of U P issued a notification declaring that with effect from June 9, 1948, the proceeds of goods entered in column 2 of the Schedule to the said notification (which included cotton yarn) shall not be included in the turnover of any dealer except at the point in the series of sales by successive dealers, and that with effect from June 9, 1949, the rate of tax in respect of the turnover of the aforesaid goods shall be as set out in the Schedule. As a result of the notification the sale of cotton yarn became taxable at a single point, i.e., at a point of sale by the importer if the goods were imported from outside Uttar Pradesh and at a point of sale by the manufacturer, if manufactured in Uttar Pradesh, and the rate of tax in respect of cotton yarn was fixed, since the date of the notification at six pies per rupee.

The Sales Tax Officer, Hathras in assessing the respondent company to sales tax for the assessment year 1948-49 held that because of the notification issued by the Government, the rate of three pies per rupee in respect of sales of cotton yarn was to apply in the year of assessment for the first 69 days and for the remaining part of the year the rate of six pies per rupee was to apply, and on that account notwithstanding that the assessee had opted under section 7 to be assessed on the basis of the turnover of the previous year, the rate of three pies was applicable to the assessable turnover for the first 69 days and for the rest of the year the rate applicable was six pies per rupee. This order was modified in appeal by the Judge (Appeals) Sales Tax, Meerut, who directed assessment of tax on the turnover at a uniform rate of three pies per rupee. But the order of the appellate Court was reversed by the Judge (Revisions) Sales Tax, U P who restored the order of the Sales Tax Officer. The Judge (Revisions) Sales Tax at the instance of the respondent company then referred to the High Court of Judicature at Allahabad the following question:

"Whether the assessee who had elected the previous year as liable to pay tax in the assessment year 1948-49 according to the rates prevailing during the year, and the High Court following its judgment in *Modi Food Products Ltd v. Commissioner of Sales Tax, U P*¹, answered the question as follows.

"all sales of the assessee during the previous year which corresponded with the calendar year 1947 have to be taxed at the flat rate of 3 pies per rupee when making the assessment for the assessment year 1948-49."

With Special Leave, the Commissioner of Sales Tax, U P, has appealed to this Court against the order of the High Court.

It may be observed that the judgment of the Allahabad High Court in *Modi Food Products Ltd's case*¹ was confirmed by this Court *Commissioner of Sales Tax, U P v. The Modi Sugar Mills Ltd.*². But the Legislature of the State of Uttar Pradesh has, since that judgment was pronounced, enacted validating legislation by Act (III of 1963) which has provided by section 7 of the Amending Act that

"After section 30 of the Principal Act, the following shall be added and be deemed to have been added with effect from the first day of April, 1948, as new section 31:

"31 (1) Where any dealer has, in accordance with the provisions of section 7, as it stood prior to its amendment by section 7 of U P Act (XIX of 1956), opted to be assessed to tax on the basis of his turnover of the previous year, he shall be assessed to tax at such rates as are prevalent during the year for which the assessment is being made and if the rates of tax on any goods or class of goods are altered during such assessment year, the dealer in respect of the turnover of such goods, shall be liable to pay tax at the altered rates as if the altered rates were in force during the previous year also proportionately for the same number of days as they are in force during the assessment year.

(2) Notwithstanding any judgment, decree or order of any Court, all assessments or orders made, actions or proceedings taken, directions issued, jurisdictions exercised or tax levied or collected by any officer or authority purporting to act under the provisions of sub-section (1) of section 7, as it stood prior to its amendment by section 7 of U P Act (XIX of 1956) shall be deemed to be good

and valid in law as if such assessments, orders, actions, proceedings, directions, jurisdictions and tax have been duly made, taken, issued, exercised, levied or collected, as the case may be, under or in accordance with the said provisions of this Act as amended by the Uttar Pradesh Bikri Kar (Sanshodhan) Adhiniyam, 1962 and as if the amendment so made had been in force on all material dates.

Explanation.—For the purpose of this section the expression “previous year” shall have the meaning assigned to it in sub-clause (ii) of clause (j) of section 2 of this Act, as it stood prior to its amendment by section 2 of the U. P. Act (XIX of 1956). ”

Section 31 makes sales tax exigible from an assessee who has opted to pay tax on the turnover of the previous year, as if the altered rates were in force during the previous year. The turnover of the previous year must therefore be broken up, the new rates of tax being applicable proportionately for the same number of days in the previous year as were in force in the assessment year. The amendment is retroactive, and applies to assessments pending or closed, as if the Validating Act had been in force at the material date.

This Court had in the *Modi Sugar Mills, Ltd.'s Case*¹, held that where the assessee had elected to submit his return on the turnover of the previous year under section 7 of Act (XV of 1948) as amended by Act (XXV of 1948) he was liable to be assessed to sales tax at the rate in force on the first day of the year of assessment, because the liability arises on that date and any subsequent enhancement of the rate by virtue of a notification under section 3-A does not alter that liability. The view expressed by the Court has been modified by express legislation operative retrospectively. The liability to tax of the turnover of the previous year which is regarded as the fictional turnover of the year of assessment has to be determined on the basis that the rates applicable in the year of assessment were fictionally projected on the taxable turnover.

Mr. Kapur appearing on behalf of the respondent company submitted that in answering the question referred by the Judge (Revisions) this Court was bound to give its opinion in the light of the law applicable to the transaction as it prevailed at the date on which the Reference was made and not of any subsequent amendment of the Act. Counsel submits that as the High Court exercises an advisory jurisdiction, so does this Court in appeal against the order of the High Court, and its advice can only be tendered on the question referred and in the light of the law as was applicable at the date when the Reference was made. Counsel says that if the law as amended is to be taken into consideration, in substance this Court would be answering a question other than the one which was referred by the Judge (Revisions) Sales Tax. In our view there is no substance in this contention. The question referred to the High Court posed a problem as to the liability of the respondent company to be assessed for the assessment year 1948-49. Two rival views were propounded before the Judge (Revisions) Sales Tax. One was that the rates applicable to the fictional turnover for the year of assessment were those prevalent in the year 1948-49 and for the purpose of assessment they had to be applied to the turnover in the same proportion in which they would have applied if the option had not been exercised. That was the contention of the Sales Tax Department. The contention of the assessee was that having opted for the turnover of the previous year, the rates applicable to the turnover would be crystallised on the first day of the year of assessment and any modification since the commencement of the year in the rates would be inapplicable. This Court in the *Modi Sugar Mills Ltd.'s case*¹ accepted the contention raised by the assessee. But for the amendment, the question which was posed by the Judge (Revisions) Sales Tax would have to be answered as it was answered by the High Court. The Legislature has, however, amended the Act and has declared that notwithstanding the option exercised by the assessee the tax would have to be computed in the light of the rates prevailing in 1948-49 as if they were projected upon the turnover of the previous year. The Legislature has expressly stated that this rule will prevail as if it was in force during the assessment year and all assessments will be made in the light of this amended rule. In answering the question which was submitted by the Judge (Revisions) Sales Tax, therefore, the law

enacted by the Legislature is the law found incorporated in section 31 by Amending Act (III of 1963). This Court in giving its opinion on the question in the light of the amending Act is seeking to apply a legislative provision which was, by express enactment in force at the time when the liability arose, for section 31 enacted by Act (III of 1963), is to be deemed to have been in operation at all material times in supersession of the previous rule declared by this Court. This Court is therefore not seeking to apply any law to the question posed before the High Court which was not in force on the date of the transaction which is the subject matter of the reference.

The following observation made by Jagannadhadas, J, in *M/s Chatturam Horilram, Ltd v Commissioner of Income tax, Bihar and Orissa*¹, on which reliance was placed by Counsel for the respondent company

* The High Court's jurisdiction was only to answer the particular question that was referred to it by the Income-tax Appellate Tribunal and it is extremely doubtful whether they would have taken notice of a subsequent legislation and answered a different question,"

does not suggest a different rule. In *M/s Chatturam Horilram, Ltd's case*¹ a previous assessment to income-tax of the assessee fell through because the Indian Finance Act of 1939 was not in force in Chota Nagpur area where the assessee was carrying on business during the relevant assessment year. Thereafter Bihar Regulation (IV of 1942) was promulgated by the Governor of Bihar with the assent of the Governor-General and thereby the Indian Finance Act of 1939 was brought into force in Chota Nagpur retrospectively as from March 30, 1939. On February 8, 1944, the Income tax Officer issued a fresh notice under section 34 of the Indian Income tax Act, 1922, which resulted in the assessment of the appellant to income tax, and the question which fell to be determined was whether the notice was properly issued under section 34 of the Act. It was argued that when the High Court answered the earlier Reference which negatived the claim of the Revenue to assess the assessee Bihar Regulation (IV of 1942) had in fact been enacted and if the High Court had applied that Regulation the result would have been different, and in meeting that argument the Court observed that it was doubtful if the High Court had jurisdiction to take into consideration the subsequent legislation for answering a question *other than the one* which was actually raised. The doubt expressed was therefore in respect of the power of the Court to decide a question other than the question which was actually referred and *not in respect of the power and indeed the duty of the High Court to apply to the question referred the law enacted with retroactive operation*.

In support of his contention Mr Kapur relied upon the observation of Desai, C J, in *M/s Rampur Distillery Chemical Works Ltd v The Commissioner of Income-Tax, U P*², to the following effect

"The argument was that though the High Court has to answer the question referred to it with reference to the law in force in 1957 (when the Tribunal disposed of the appeal) what that law was has to be discovered to-day with reference to the law existing to-day. What was the law in 1957 on the basis of which the Tribunal disposed of the appeal has certainly to be decided by this Court to-day but what has to be decided is the law existing in 1957 and not deemed to exist in 1957 by virtue of an amendment in the law made in 1962.

But in that case, in the view of the High Court the amendment made by the amending statute of 1962 which came into force after the reference was made by the Income-tax Tribunal had no retrospective operation, and the question Referred by the Tribunal had to be answered by the High Court in the light of the relevant law applicable at the date of the transaction. The observation relied upon has to be read in the context of the finding of the High Court as to the character of the amending legislation. The observation therefore does not assist the contention that even in cases where the relevant statute has been amended with retroactive operation, so as to apply to the transaction which forms the subject matter of the Reference, the High Court or this Court is bound in recording its opinion on the question referred to ignore the amended law. If what Counsel contends is true, the answer given by the High Court or by this Court would have no value whatever in cases where by retroactive

amendment of the law, the old law has been superseded and is substituted by a new statutory provision. Undoubtedly the Tribunal called upon to decide a taxing dispute must apply the relevant law applicable to a particular transaction to which the problem relates, and that law normally is the law applicable as on the date on which the transaction in dispute has taken place. If the law which the Tribunal seeks to apply to the dispute is amended, so as to make it the law applicable to the transaction in dispute, it would be bound to decide the question in the light of the law so amended. Similarly when the question has been referred to the High Court and in the meanwhile the law has been amended with retroactive operation, it would be the duty of the High Court to apply the law so amended if it applies. By taking notice of the law which has been substituted for the original provision, the High Court is giving effect to legislative intent and does no more than what must be deemed to be necessarily implicit in the question referred by the Tribunal, provided the question is couched in terms of sufficient amplitude to cover an enquiry into the question in the light of the amended law, and the enquiry does not necessitate investigation of fresh facts. If the question is not so couched as to invite the High Court to decide the question in the light of the law as amended or if it necessitates investigation of facts which have not been investigated, the High Court may refuse to answer the question. Application of the relevant law to a problem raised by the Reference before the High Court is not normally excluded merely because at the date when the Tribunal decided the question the relevant law was not or could not be brought to its notice. There is nothing so peculiar in the nature of a Reference under the Indian Income-tax Act or the Sales Tax Acts that in deciding it the High Court is restricted to the application of the law which has been superseded by legislation since the date when the Reference was made by the Tax Tribunal and is obliged to refuse to apply the law which by legislative direction has to be applied to a particular transaction which is the subject-matter of the Reference.

On the view taken by us this appeal must be allowed and the question raised by the Judge (Revisions) Sales Tax must be answered in the affirmative. Having regard to the circumstances of the case, the parties will bear their own costs both in this Court and the High Court.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax Madras,

.. Appellant*

v.

Amrutanjan Limited, Madras

.. Respondent.

Income-tax Act, (XI of 1922), section 23-A, Third Proviso and Explanation—Company in which public substantially interested—What constitutes—More than half the voting power vested in public—Substantial public interest—Not less than twenty-five per cent. of voting power, other than the controlling group held, by public—Explanation to section raises a presumption of substantial interest—Explanation contains presumption and not the definition.

The assessee company formed in 1936 took over from N for Rs. 5,50,000 paid over in the form of 2,500 ordinary, 3,000 preference fully paid-up shares. Under the Articles of Association, the preference shareholders were entitled to a fixed dividend, with no right in the balance of profits. The company was managed after the death of N by a firm consisting of the widow of N, daughter of N, widow's brother and daughter's husband. Between 1st April, 1946 to 31st March 1949, the widow was holding 2,185 ordinary shares and the daughter 250 ordinary shares. Out of the preference shares only 385 were held by the directors including the widow and daughter. Under the Articles all shareholders had one vote for each share. For the years in question the Income-tax Officer, on the ground that the dividend declared by the assessee was less than the statutory percentage, passed a distribution order which was confirmed in appeals by the Appellate Commissioner and the Tribunal. The High Court in a Reference under section 66 (1) held on the application of the Explanation to section 23-A of the Income-tax Act, that the company was one in which the public was substantially interested, and the Officer would have no jurisdiction to proceed under section 23-A. The Department appealed, on a certificate of fitness, to the Supreme Court.

Held Section 23 A of the Act was enacted with the object of preventing avoidance of super tax by shareholders controlling the affairs of a company in which the public are not substantially interested, by the expedient of not distributing dividend out of the profits

The Act has not defined the expression 'company in which the public are substantially interested'. Normally a company would be deemed to be one in which the public are substantially interested where more than half the voting power is vested in public. Where the controlling interest minimum of fifty-one per cent. of the voting right is held by a single individual or a group of individuals acting in concert the company would be regarded as one in which the public are not substantially interested.

The *Explanation* raised a conclusive presumption in those cases where shares of the company carrying not less than twenty five per cent. of the voting power are held by persons other than the controlling group that the company is one in which the public are substantially interested. For the purpose of computing twenty five per cent. of the power the rights of holders of shares entitled to a fixed dividend have to be excluded. But for ascertaining the voting power voting rights attached to all the shares must be taken into account.

In terms however the *Explanation* raises a presumption and does not purport to define a company in which the public are substantially interested.

The distinction between the controlling group and the public is not along the line which distinguishes directors from the remaining members of the company. If a director does not belong to the controlling group he will be regarded as a member of the public for the purposes of Third Proviso and the *Explanation* to the section even though such director was directly entrusted with the management of the affairs of the company.

In the instant case the shares not entitled to a fixed dividend, carrying not less than twenty five per cent. of the voting power are not shown to have been allotted unconditionally to, or acquired unconditionally by or beneficially held by the public. The *Explanation* has therefore no application.

Whether by the application of the Third Proviso there exists a controlling interest in the hands of one shareholder or a group of shareholders as would render the company one in which the public are not substantially interested cannot be decided by the Supreme Court in the absence of investigation made by the Department on the question.

Appeals from the Judgment dated 5th April, 1960 of the Madras High Court in Case Referred No. 80 of 1955

C K Daphtary, Attorney-General for India and *K N Rajagopala Sastri* Senior Advocate, (*R N Sachthy*, Advocate, with them), for Appellant (In all Appeals)

S Narayanaswamy and *R Gopalakrishnan*, Advocates, for Respondent (In all Appeals)

The Judgment of the Court was delivered by

Shah, J—One Nageswara Rao Panthulu set up a business of manufacturing a "pain balm" which was marketed in the trade name of "Amrutanyan". In September, 1936, the respondent company was floated as a public limited company under the Indian Companies Act, 1913, to acquire and carry on the business of manufacture and sale of "Amrutanyan". The authorised capital of the company was 7,000 ordinary shares and 3,000 preference shares of Rs. 100 each, and the issued and paid up capital was 2,500 ordinary and 3,000 preference shares. The preference shareholders were under the Articles of Association entitled to a fixed dividend of 7½ per cent. on the face value of the shares, with no right in the balance of the profits. The respondent company took over the business conducted by Nageswara Rao Panthulu for Rs. 5,50,000 paid in the form of 2,500 ordinary and 3,000 preference fully paid up shares. This company was managed by a firm which after the death of Nageswara Rao Panthulu consisted of Ramayamma, widow of Nageswara Rao, Kamakshamma, his daughter, Ramayamma's brother Ramachandra Rao and Kamakshamma's husband Sambu Prasad. Between 1st April, 1946 to 31st March, 1949, Ramayamma, widow of Nageswara Rao, was holding 2,185 ordinary shares and her daughter Kamakshamma was holding 250 ordinary shares. Out of the preference shares only 385 were held by the directors including Ramayamma and Kamakshamma.

Under the Articles of Association of the company, both preference and ordinary shareholders were entitled to vote at the meeting of the company—each shareholder being entitled to exercise one vote for each share. In the course of assessment proceedings of the respondent company, the Income tax Officer found that for the three

years ending 31st March, 1947, 31st March, 1948 and 31st March, 1949, the company had declared each year a total dividend of Rs. 38,750 at the rate of $7\frac{1}{2}$ per cent. on the preference shares and $6\frac{1}{2}$ per cent. on the ordinary shares—which was considerably less than sixty per cent. of the amount available for distribution as computed under section 23-A of the Income-tax Act, as it stood at the material time. The Income-tax Officer served a notice, after obtaining the approval of the Inspecting Assistant Commissioner of Income-tax, requiring the respondent company to show cause why an order under section 23-A of the Income-tax Act, 1922, should not be passed against the company, and after considering the objections raised by the company ordered on 31st March, 1953, that the undistributed portion of the assessable income of the company as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof, shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the respective general meetings. This order was confirmed in appeal by the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal.

Several contentions were raised before the Revenue Authorities and the Tribunal challenging the competence of the Income-tax Officer to pass an order under section 23-A including the contention that the said provision was unconstitutional or *ultra vires*. These have been negatived by the Tribunal and also by the High Court and it is unnecessary to refer to those contentions in these appeals as they do not survive for determination.

In a Reference made under section 66 (1) of the Indian Income-tax Act, the Tribunal referred three questions to the High Court of Judicature at Madras. The third question, which alone is material in these appeals, reads as follows :

“Whether the provisions of section 23-A were correctly applied for the three relevant years ?”

The High Court held that the respondent company was one in which the public were substantially interested, and therefore the Income-tax Officer had no jurisdiction to pass the order under section 23-A of the Income-tax Act for any of the three years and on that footing answered the question in the negative. Against the order passed by the High Court, with certificate of fitness the Commissioner of Income-tax has appealed to this Court.

Section 23-A of the Indian Income-tax Act, 1922, before it was amended by the Finance Act, 1955, stood as follows :

“(1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, * * * make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, * * *

Provided * * * *

Provided further * * *

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

Explanation.—For the purpose of this sub-section,—

a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by the public (not including a company to which the provisions of this sub-section) apply, * * *

The section was enacted with the object of preventing avoidance of super-tax by shareholders controlling the affairs of a company in which the public are not substantially interested, by the expedient of not distributing dividend out of the profits.

Under the Annual Finance Acts for many years the rates of super tax applicable to companies were much lower than the higher rates applicable to other assesseees. That gave an inducement to persons controlling companies to avoid the higher incidence of super tax by transferring to limited companies their business. Thereby the source of earning was secured, the profits of the business could be accumulated till they were distributed in the form of capital, and in the meanwhile accumulations of undistributed profits received available to them for purposes of their other business. With a view to foil attempts made by persons holding controlling interest in companies to avoid payment of super tax applicable to non corporate assesseees by refusing to agree to distribution of profits, section 23 A was enacted by the Legislature. The Income-tax Officer was thereby authorised, if satisfied, when less than sixty per cent of the assessable income of the company, subject to reductions permitted thereby was not distributed to pass an order under which the income was deemed to be distributed among the shareholders entitled thereto. By the order so made a fictional or notional income which was not in fact received by the shareholders was deemed to be distributed, and in the hands of the shareholders such deemed income was liable to tax as if it had arisen or accrued to them. But by the express provision contained in section 23 A, as it stood at the material time, no order could be passed in respect of any company in which the public were substantially interested and to a subsidiary company of such a company if the whole of the share capital of such subsidiary company was held by the parent company or by the nominees thereof. The Act however, did not define the expression "company in which the public are substantially interested". Normally a company would be deemed to be one in which the public are substantially interested where more than half the voting power is vested in the public. Where the controlling interest, i.e., a minimum of fifty one per cent of the voting right is held by a single individual or a group of individuals acting in concert, the company would be regarded as one in which the public are not substantially interested. But the Legislature by the *Explanation* has raised a conclusive presumption in those cases where shares of the company carrying not less than twenty five per cent of the voting power are held by persons other than the controlling group. For the purpose of computing twenty five per cent of the power, however, rights of holders of shares entitled to a fixed dividend have to be excluded.

It is now settled law that the distinction between the controlling group and the public is not along the line which distinguishes directors from the remaining members of the company. If a director does not belong to the controlling group, he will be regarded as a member of the public for the purpose of the Third Proviso and the *Explanation* to section 23 A even though such director was directly entrusted with the management of the affairs of the company.

The Commissioner contends that the *Explanation* to sub-section (1) of section 23-A is in reality a clause which defines what a company, in which the public are substantially interested, is. In terms, however, the *Explanation* raises a presumption and does not purport to define a company in which the public are substantially interested. On an analysis of the provisions of the Third Proviso to section 23 A and its *Explanation*, the following position emerges:

(1) Where there is no individual member or a group of members acting in concert holding fifty-one per cent or more of the voting power, which controls the working of a company, it is from its very nature a company in which there is no controlling member or group and therefore, the public are substantially interested,

(2) Where a shareholder holds or a group of shareholders acting in concert hold fifty one per cent or more of the voting power, the question is one of fact to be determined in each case whether it is a company in which the public are substantially interested, having regard to the purpose for which the holding of fifty-one per cent or more is utilised,

(3) Where not less than twenty five per cent of the voting power is allotted unconditionally to, or is acquired unconditionally by or is beneficially held by the

public, it shall be presumed that the company is one in which the public are substantially interested. But in considering whether shares carrying not less than twenty-five per cent. of the voting right are held by the public, shares entitled to a fixed rate of dividend have to be excluded.

The reason of the rule which excludes from the computation of voting power holders of shares entitled to a fixed rate of dividend is that section 23-A is directed primarily against the accumulation of undistributed dividends to avoid payment of non-corporate rates of super-tax. But shareholders who are entitled to a fixed rate of dividend are not directly interested in such accumulation; it matters little to them whether the dividend is immediately distributed to the ordinary shareholders or is accumulated, and therefore in assessing whether the twenty-five per cent. of the shares are vested in persons other than the controlling group, the shares yielding a fixed rate of dividend have to be ignored. But for the purpose of ascertaining the voting power, voting rights attached to all the shares must be taken into account.

No investigation has been made by the Income-tax Department whether there is any group of persons controlling the working of the company. It is true that Ramayamma was holding 87.40 per cent. of the ordinary shares issued by the company, and there is obviously no person who could hold twenty-five per cent. or more of the ordinary shares. In the present case, as already observed, the preference shareholders were entitled to vote at the meeting and the Articles of Association of the Company made no distinction between the preference and the ordinary shareholders in the matter of exercise of voting rights. The total voting power was 5,500—one vote for each share, ordinary and preference alike and twenty-five per cent. of that voting power is 1,375, but to invite the presumption under the *Explanation* this power must be exercisable only by the ordinary shareholders, and not by shareholders entitled to a fixed rate of dividend. The presumption under the *Explanation* could arise only, if twenty-five per cent. of the voting power was held by persons entitled to ordinary shares outside the controlling group.

It was suggested that the expression “twenty-five per cent. of the voting power” would mean not twenty-five per cent. of the total voting power, but power exercisable in respect of shares other than shares entitled to a fixed rate of dividend. *Prima facie*, such an interpretation is not warranted if regard be had to the terms of the *Explanation*. But even that argument is of no value, for twenty-five per cent. of the voting power attached to the ordinary shares is not exercisable by the public. This, therefore, is a case in which shares not entitled to a fixed dividend carrying not less than twenty-five per cent. of the voting power are not shown to have been allotted unconditionally to, or acquired unconditionally by or beneficially held by the public. The *Explanation*, therefore, has no operation.

Whether in view of the Third Proviso the company may be regarded as one in which the public are substantially interested, is a question to which no attention was paid by the Tribunal. Whether in fact there exists such a controlling interest in the hands of one shareholder or a group of shareholders as would render the company one in which the public are not substantially interested is a question which therefore cannot be decided by this Court.

The order of the High Court must therefore be confirmed, but on different grounds. The interpretation of the *Explanation* by the High Court, for reasons already set out was incorrect, the *Explanation* had no application, because no presumption on the facts found could arise thereunder. The Revenue Authorities have not made any investigation on the question whether there existed any controlling interest in a group of persons, so as to bring the case within the Third Proviso.

The appeals must be dismissed with costs. One hearing fee.

V. S.

Appeals dismissed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, M HIDAYATULLAH, AND J C. SHAH, JJ
Pulavarthi Venkata Subba Rao and others . . . Appellants*

Valluri Jagannadha Rao (deceased) by his heirs and legal representatives, and others . . . Respondents

Madras Agriculturists Relief Act (IV of 1938), section 19 (as amended by Madras Act XXIII of 1948)—Amending Act (1948), section 16 (ii) and (iii)—Applicability—Compromise decree passed before Amending Act—If can be scaled down after amendment—Res judicata—Applicability—Estoppel by conduct—Necessity for a plea

Clause (ii) of section 16 of the Madras Agriculturists Relief (Amendment) Act (XXIII of 1948) applies only to those decrees which can be said to be final in contradistinction to decrees which are merely interlocutory or preliminary clause (iii) of the section governs all cases of money decrees in which the decree passed has not been executed or satisfied in full before the commencement of the Act. No distinction is made between decrees passed after contest and decrees passed on compromise. Both the kinds of decrees are amenable to the provisions of section 19 (2) of Act (IV of 1938) and also of section 16 (iii) of Act (XXIII of 1948). There being no distinction between decrees passed after contest and decrees passed on compromise, the words "in which the decree or order passed has not become final" in clause (ii) of section 16 of the Amending Act cannot be held to refer to a compromise decree but to decrees which are final such as final decrees for foreclosure etc., in suits on mortgages.

Compromise decree is not a decision by the Court. It was acceptance by Court of something to which the parties had agreed. Only a decision by a Court can be *res judicata* whether statutory under section 11 of the Code of Civil Procedure or constructive as a matter of public policy on which the entire doctrine rests. The debtors can claim to raise the issue over again because of the new rights conferred by the Amending Act. The earlier decision cannot strictly be regarded as on a matter which was "heard and finally decided". The decree might have created estoppel by conduct between the parties but the debtors did not plead this estoppel at any time in the instance case.

Appeal from the Judgment and Order dated 6th April, 1955, of the former Andhra High Court in C R P No 656 of 1950.

D Narasimha Advocate-General, for the State of Andhra Pradesh, (T V R. Tatachari, Advocate, with him), for Appellants

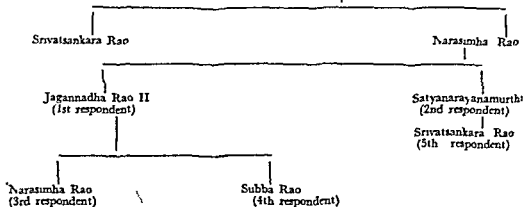
T Sathyanarayana, Advocate, for Respondents

The Judgment of the Court was delivered by

Hidayatullah, J.—This appeal on certificate granted by the High Court of Andhra Pradesh, is directed against its judgment dated 6th April, 1955, dismissing Civil Revision Petition No 656 of 1950. The High Court held that the respondents were agriculturists within the Madras Agriculturists Relief Act, 1938 (called for brevity "the Act") and were entitled to a scaling down of the decree in O S No 52 of 1941, dated 27th August, 1945. The decree-holders are the appellants before us. We will now give the facts relevant to the present appeal.

The respondents were members of an undivided Hindu family and the following genealogy is useful in following the facts —

Valluri Jagannadha Rao I



Narasimha Rao had taken loans on promissory notes from the ancestors of the present appellants, and a suit was filed for Rs. 50,000 odd in 1941 against the family. That suit was O.S. No. 52 of 1941. In that suit, an application was made by the respondents, claiming to be agriculturists, for the scaling down of the amount. The plaintiffs in the case denied that the defendants were agriculturists. The suit, however, ended in a compromise decree for Rs. 37,000 on 23rd August, 1945, as against the claim for Rs. 50,964-1-0. It appears that some payments were also made towards this decretal amount. On 21st February, 1949, the judgment-debtors made another application in the suit (Interim Application No. 279 of 1949) for scaling down the decretal amount on the ground that they were agriculturists entitled to the benefits of the Act, as amended in 1948. The decree-holders have raised three defences, (i) that the Amending Act was not applicable in view of the provisions of section 16 (ii) of the Amending Act as the compromise decree had "become final", (ii) that the earlier compromise decree operated as *res judicata*, and (iii) that the judgment-debtors were not agriculturists as they were a joint Hindu family owning an estate for which a *peshkash* of more than Rs. 500 was payable.

The Subordinate Judge, Narsapur, before whom the application was made, framed two issues as follows :—

- (1) Whether the petitioners are agriculturists entitled to the benefits of the Act, and
- (2) Whether the present petition is barred under section 16 (ii) of the Amending Act—Madras Agriculturists Relief (Amendment) Act (XXIII of 1948.)

The learned Subordinate Judge first considered the second issue which was one of law and by his order dated 15th March, 1950, held that the decree was liable to be scaled down in view of the provisions of the Amending Act. He then set down the first issue for trial and posted the case for evidence on the question whether the judgment-debtors were agriculturists. The decree-holders meanwhile filed an application for revision (C.R.P. No. 656 of 1950) on 28th April, 1950. The High Court heard this application on 20th August, 1952, and decided to call for a finding from the Subordinate Judge whether the judgment-debtors were agriculturists. A preliminary order was made by the High Court directing the Subordinate Judge to take evidence and to submit his finding on this point and the parties were to be given an opportunity to object to the finding after it was received. The Subordinate Judge, after recording the evidence, submitted his finding on 17th December, 1952. He held that the judgment-debtors constituted a joint Hindu family which owned an estate for which a *peshkash* of more than Rs. 500 was payable and were thus not agriculturists.

When this finding was received in the High Court, the Revision Application was taken up for consideration. The High Court agreed with the Subordinate Judge that the provisions of the Amending Act, were applicable, that the compromise decree could not be regarded as final for purposes of clause (ii) of section 16 of the Amending Act, and that the principle of *res judicata* did not apply. The High Court endorsed the opinion of the Subordinate Judge that the judgment-debtors were entitled in law to have the decree scaled down, provided they were agriculturists. The High Court then considered the second question, and differing from the Subordinate Judge, came to the conclusion that the judgment-debtors were agriculturists and entitled to have the decree scaled down. The decree-holders have appealed.

Before dealing with the questions that arise in this case, a few more facts relevant to the question whether the judgment-debtors can be considered to be agriculturists or not, may be stated. The family, it is admitted, owned two villages, namely, Kalagampudi and Pedamamidipalli, which were an estate as defined in the Madras Estates Land Act. The villages belonged to Valluri Jagannadha Rao I, the original holder, and were his self-acquired properties. Jagannadha Rao I executed a will in respect of these and other properties on 20th March, 1902 (Exhibit A-17). By that will, he gave a life-estate in the two villages to his two sons—Valluri Srivatsankara Rao and Valluri Narasimha Rao—and an absolute estate to such of the

sons of these two as might be living at the termination of each of the life estates, respectively. The will provided further that if any of his sons left no son, the sons of his other son would be absolutely entitled to the properties at the end of the life estate. It was also provided that if his two sons wished to divide the property, the elder son Srivatsankara Rao was to take Kalagampudi and the younger son, the other village. The two sons divided the properties in which they were given life estates, *vide* Exhibit B-1 dated 14th June, 1911. Srivatsankara Rao took Kalagampudi and Narasimha Rao took Pedamamidipalli. Srivatsankara Rao died on 15th December, 1936, without leaving a son, and Jagannadha Rao II and Satyanarayana-murthi, the two sons of Narasimha Rao, became absolutely entitled to Kalagampudi in equal shares. On 18th February, 1941, Narasimha Rao, executed a sale deed (Exhibit A-57) in respect of two-fifth share in Pedamamidipalli village in favour of Subhadradevi, his daughter. Narasimha Rao died on 17th May, 1943, and Jagannadha Rao II and Satyanarayana-murthi became entitled to a half share each in the three fifth share in Pedamamidipalli village in addition to the half share in Kalagampudi. The judgment debtors claimed that there was a partition between the two sons of Narasimha Rao in 1946.

The *peshkash*, which was payable for the two villages when they were in the name of Jagannadha Rao I, was Rs 979-3-0 (*vide* Exhibit I-A dated 6th October 1879). After the death of Srivatsankara Rao in 1936, the two villages were separately registered. Pedamamidipalli was registered in the name of Narasimha Rao and Kalagampudi, in the name of his two sons. The *peshkash* was then apportioned between the two villages and Rs 483-12-10 was fixed as *peshkash* for Pedamamidipalli village and Rs 495 6 2, for Kalagampudi village. This is stated in the proceedings of the Collector, West Godavari, (Exhibit A-4), dated 24th April, 1940.

To decide whether the conclusion of the Subordinate Judge or of the High Court is right, it is necessary at this stage to read a few provisions of the Act. 'Agriculturist' is defined by section 3 (ii) of the Act and the relevant parts of the definition are as follows —

" (ii) 'agriculturist' mean a person who—

(a) has a saleable interest in any agricultural or horticultural land in the State of Madras not being land situated within a Municipality or Cantonment, which is assessed by the State Government to land revenue (which shall be deemed to include *peshkash* and quit-rent) or which is held free of tax under a grant made, confirmed or recognised by Government, or

(b) holds an interest in such land under a landholder under the Madras Estates Land Act, 1908 as tenant, ryot or under tenure holder, or

* * * * *

Provided that a person shall not be deemed to be an 'agriculturist' if he—

(d) is a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof, whether separately registered or not, in respect of which estate, share or portion any sum exceeding five hundred rupees is payable as *peshkash*, or any sum exceeding one hundred rupees is payable under one or more of the following heads namely, quit rent jodi kattubadi poruppu or other due of a like nature or is a janmi under the Malabar Tenancy Act, 1929 who is liable as such janmi to pay to the State Government any sum exceeding five hundred rupees as land revenue "

The word 'person' is defined by clause (i) of section 3 as including an undivided Hindu family

The contention of the judgment-debtors was that there were two persons who were legatees under the will. They took the villages not as ancestral properties but as self-acquired properties, and the *peshkash* payable on these two villages must be divided between them before section 3 (ii), *Proviso* (D) of the Act was made applicable. The contention on the side of the decree-holders was that these properties were held by an undivided Hindu family and the sons of Narasimha Rao took the properties under the will as ancestral properties, and the *peshkash* in respect of the

two villages must be added together for the purpose of the application of the said *Proviso*. The High Court held that the properties taken by the two sons of Narasimha Rao, under the will, were their separate properties and not ancestral properties, as there were no words to show a contrary intention. The High Court also referred to the conduct of the respondents in partitioning the villages and held that the property was held not jointly but in definite shares. The High Court, therefore, held that the *peshkash* in respect of the two villages could not be aggregated. The High Court, accordingly, broke up the *peshkash* in respect of Kalagampudi and the three-fifth share of Pedamamidipalli into two halves and held that as each son of Narasimha Rao was required to pay only his share, the *peshkash* paid by them individually did not exceed Rs. 500 mentioned in *Proviso* (D), and that the judgment-debtors were, therefore, agriculturists. This part of the case was not challenged before us by the learned Advocate-General of Andhra Pradesh. Indeed, the decision of the High Court is supported by *C. N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar and another*¹, in respect of the character of the property inherited by the two sons of Narasimha Rao, and this fundamental fact could not be questioned. We must then start with the conclusion that the judgment-debtors are agriculturists. Before we consider the other objections to the claim of the respondents to have the decree scaled down, we will deal with another argument on this part of the case. It is contended that the High Court was in error in interfering with the finding that the respondents are not agriculturists in an application for Revision under section 115, Civil Procedure Code. This, in our opinion, is not a correct summing up of what the High Court did. The High Court had called for a finding and it was to be subject to objections by the parties. The High Court could have called for the evidence and itself given a finding. In re-examining the evidence with a view to reaching a correct finding on the question whether the judgment-debtors were agriculturists or not, the High Court was not interfering in Revision with a finding of fact, but was drawing the correct inference from evidence it had itself ordered to be recorded before considering the law applicable to the case. In our opinion, this objection has no validity.

It was next argued that the respondents cannot claim the benefit of the Act, because the compromise decree must be considered to have become a final decree and the second clause of section 16 of the Amending Act and not the third applied, and in any event, the respondents were concluded by the compromise decree which operated as *res judicata*. To understand this argument, it is necessary to read section 19 of the Act and section 16 of the Amending Act. Section 19 of the Act was amended by the addition of sub-section (2) in 1948. Section 19, as amended, reads :—

“19 (1) Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be:

Provided that all payments made or amounts recovered, whether before or after the commencement of this Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed to the creditor.

(2) The provisions of sub-section (1) shall also apply to cases where, after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement”.

The Amending Act also provided by section 16 :

“16. The amendments made by this Act shall apply to the following suits and proceedings, namely :—

(i) all suits and proceedings instituted after the commencement of this Act ;

(ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order passed has not become final, before such commencement ;

1. (1953) S.C.J. 707: (1953) 2 M.L.J. 796 : (1954) S.C.R. 243.

(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act

Provided that no creditor shall be required to refund any sum which has been paid to or realized by him before the commencement of this Act

The contention of the appellants is that a compromise decree is a decree which finally determines the rights of the parties and the case is, therefore, governed by clause (ii) of section 16 and not by clause (iii), as claimed by the respondent. There seems to have been at one time some difference of opinion in the interpretation of this section in the High Court, but the view which has prevailed is that the section applies only to those decrees which can be said to be final in contradistinction to decrees which are merely interlocutory or preliminary. It has also been held now for a long time in the High Court that clause (iii) governs all cases of money decrees in which the decree passed has not been executed or satisfied in full before the commencement of the Act. See *Venkataraman v Seshamma*¹. In other words all decrees which have been executed and satisfied before the commencement of the Amending Act on 12th January, 1949, are unaffected by the Amending Act but all decrees which are not final and which remain to be executed either wholly or in part, are subject thereto, but the *Proviso* states that in scaling down such decrees the decree-holder would not be required to refund any sum which might have been paid or realized by him. No distinction is made between decrees passed after contest and decrees passed on compromise. Both the kinds of decrees are amenable to the provisions of section 19 (2) and also of section 16 (iii). There being no distinction on between decrees passed after contest and decrees passed on compromise, the words "in which the decree or order passed has not become final" in clause (ii) of section 16, cannot be held to refer to a compromise decree but to decrees which are final such as final decrees for fore-closure, etc., in suits on mortgages. The prevailing interpretation of the section in the High Court is preferable in view of the generality of the words used in sections 19 (2) and 16 (iii). In any event, it would be improper to unsettle a view of law which has now become inveterate. This case was governed by section 16 (iii), read with section 19 (2) and the respondents were entitled to broach the question of the scaling down of the decree once again.

The appellants then seek to reach the same result by invoking the principle of *res judicata*. It is contended that the earlier decision amounts to *res judicata* and the respondents were not entitled to raise the same issue which by implication must be held to be decided against them by the compromise judgment and decree. In the alternative, it is contended that the earlier compromise decree creates an estoppel against the respondents, because the appellants at that time had shown some concession in the amount which they were claiming and a decree for a lesser amount was passed. This estoppel was said to be an estoppel by judgment. In our opinion, these contentions cannot be accepted. The Act as amended confers this right upon petty agriculturists to save them from the operation of loans taken at usurious rates of interest. No doubt the conduct of the respondents in omitting to press the claim for reduction of the amount of the claim on the first occasion is significant, but this did not constitute *res judicata*, either statutory or constructive. The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the Court on the agreement of the parties. The Court did not decide anything. Nor can it be said that a decision of the Court was implicit in it. Only a decision by the Court could be *res judicata*, whether statutory under section 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests. The respondents claim to raise the issue over again because of the new rights conferred by the Amending Act which rights include, according to them, the re-opening of all decrees which had not become final or which had not been fully executed. The respondents are entitled to take advantage of the amendment of the law unless the law itself barred them,

or the earlier decision stood in their way. The earlier decision cannot strictly be regarded as on a matter which was "heard and finally decided." The decree might have created an estoppel by conduct between the parties; but here, the appellants are in an unfortunate position, because they did not plead this estoppel at any time. They only claimed that the principle of *res judicata* governed the case or that there was an estoppel by judgment. By that expression, the principle of *res judicata* is described in English law. There is some evidence to show that the respondents had paid two sums under the consent decree but that evidence cannot be looked into in the absence of a plea of estoppel by conduct which needed to be raised and tried. The appellants are, however, protected in respect of these payments by the *Proviso* to clause (iii) of section 16 of the Amending Act.

In our opinion, this appeal has no merits and must fail. It is, accordingly, dismissed, but in the circumstances of the case, we make no order about costs in this Court.

K. S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K.N. WANCHOO AND K.C. DAS GUPTA, JJ.
Varada Bhavanarayana Rao .. Appellant*

v.

The State of Andhra Pradesh and others

.. Respondents.

Madras Estates Land Act (I of 1908) (as amended by Act II of 1945), section 3 (2) (d) Explanation (1) "Estate"—Grant of named village in which minor grants also existed—Burden of proof as to when minor grants were made—Madras Estates (Reduction of Rent) Act (XXX of 1947)—"Estate"—Test.

To make a grant of the rest of the village as a named village an "estate" it must be shown that the minor inams which covered part of the village (*devadaya*m and other personal inams) had been granted prior to the grant of the rest of the village. The *Explanation (1)* to section 3 (2) (d) of the *Madras Estates Land Act* (as amended in 1945) did not create any presumption either way as to whether minor inams had been granted prior or the subsequent to the grant of a named village.

The plaintiff who asks the Court for a declaration that the area covered by a title deed is not an estate must prove that it is not an estate. There is no presumption that such area is an estate or that it is not an estate. The plaintiff who is to prove that the suit lands do not form an estate must show that the minor inams were granted subsequent to the date of the inam grant of the named village. If no evidence was given on either side the plaintiff must fail.

District Board, Tanjore v. Noor Mohd., A.I.R. 1953 S.C. 446 : (1952) 2 M.L.J. 586, explained.

Appeal from the Judgment and Decree dated 26th November, 1958, of the Andhra Pradesh High Court in Appeal Suit No. 1228 of 1953.

N.V. Ramadas and T.V.R. Tatachari, Advocates, for Appellant.

P. Rama Reddy and P.D. Menon, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Das Gupta, J.—In the district of Vishakhapatnam in the State of Madras there is a village known by the name of Vandrada. The entire area of this village is now covered by 5 inam grants, by far the major portion being comprised in the inam held by the appellant, Varada Bhavanarayana Rao. In 1864 the Inam Commissioner granted fresh inam title deeds in confirmation of the existing inam grants; the total area of the village was recorded as 768.60 acres. Out of this 66.12 acres were un-assessed poramboke; 690.13 acres of dry and wet lands were included in a title deed which is numbered 1082; 9.25 acres were included in title deeds Nos. 940 and 941; two other title deeds Nos. 179 and 180 granted by the Inam Commissioner covered an area of 3.04 acres. The question in controversy in the present litigation is whether the inam created by the original grant in confirmation of which title deed No. 1082 was issued by the Inam Commissioner forms an "estate" to which the *Madras Estates Land (Reduction of Rent) Act, 1947 (XXX of 1947)* applies. This Act will be later referred to in this judgment as "the *Reduction of Rent Act*." It is necessary to mention here that section 1 of this Act provides that it applies to all estates as defined in section 3 (2) of the *Madras Estates Land Act*,

1908 The relevant portion of section 3 (2) of the Madras Estates Land Act runs thus —

“(d) any inam village of which the grant has been made, confirmed or recognised by the Government notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees

Explanation (1) —Where a grant as an inam is expressed to be of a named village the area which forms the subject matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes

The Special Officer appointed by the Government of Madras under section 2 of the Rent Reduction Act decided that the inam lands in respect of which title deed No 1082 had been issued and which now admittedly are held in inam by the appellant formed an estate. Accordingly the Officer, acting under the Act recommended fair and equitable rates of rent for the rayati lands in this estate. On 27th June 1950, the Government of Madras published in the Gazette a notification fixing the rates of rents payable in respect of lands in the village in accordance with these recommendations. Aggrieved by this action of the Government the appellant moved the High Court of Madras under Article 226 of the Constitution praying for a writ of *mandamus* directing the State to forbear from giving effect to the notification. The High Court held that the remedy of the petitioner was by way of a suit and dismissed the application on an undertaking given by the Government that it would waive its right to the notice under section 80 of the Code of Civil Procedure. It was after this that the appellant filed in the Court of the Subordinate Judge, Srirakulam, the suit out of which this appeal has arisen.

In his plaint the appellant averred that for the lands comprised under title deed No 1082, there was neither the grant of a whole village nor of a named village. It was also stated by the appellant that the lands now covered by the single title deed No 1082 originally formed the subject-matter of several separate grants. The plaintiff further averred that out of the lands of the village not included in any of the earlier grants, further grants were made subsequently which were separately confirmed and separate title deeds—Title deeds Nos 940, 941 and Nos 179 and 180—were issued in respect of them. It was mainly on the basis of these averments that the plaintiff contended that his lands covered by the title deed No 1082 were not at all an estate and prayed for a declaration to this effect. The State of Madras was the main defendant in the suit and contested the plaintiff's claim. In its written statement the State pleaded that there was in respect of the suit land a single grant of a named village and that it was not true that from out of any reserved lands further grants were made subsequently. Accordingly, it was urged that the plaintiff's contention that these lands did not form an estate should be rejected. Similar pleas were raised also by defendants 2 to 31 who were impleaded as the tenants cultivating some of the lands covered by the title deed No 1082.

The trial Court held that as the original grant is shown by the entries in the Inam Fair Register to have been made to a number of persons and there were deductions for poramboke and for personal and service inams, and further because even though the original grant may have been under a single transaction the confirmation was not by one title deed, the suit lands did not constitute an estate as defined in section 3 (2) (d) of the Madras Estates Land Act.

On appeal by the State of Madras, the High Court of Madras came to a contrary conclusion. The High Court pointed out that the opinion of the trial Judge that to constitute an estate the confirmation must be under one grant was unsupportable. In the opinion of the High Court the entries in the Inam Fair Register showed that the grant consisted of a named village and it was the inam as granted that was confirmed by the Inam Commissioner. The High Court also expressed its view that “the whole Inam inquiry proceeded on the footing that it was the whole village, excepting the two minor inams, that was given in inam to Chattr Venkatacharulu etc. The High Court accordingly allowed the appeal and dismissed the suit with costs.

Against this decision of the High Court the present appeal has been filed by the plaintiff on a certificate granted by the High Court.

In support of the appeal, Mr. Tatachari has contended that there were no materials on the record to show that the original grant was of a whole of the village or of a village by name. His next contention is that even if it be held against his client that the original grant that was ultimately confirmed by the title deed No. 1082 was of a named village the burden still lay on the defendants to show further that the portion of the village now covered by the minor grants (in respect of which title deeds Nos. 940 and 941 and title deeds Nos. 179 and 180 were issued) had been granted prior to the date of that original grant. Learned Counsel contends that the defendants have failed to discharge this burden and so the plaintiff's case that these lands do not form an estate should be accepted.

The several questions of fact that arise in this case have to be decided on the meagre evidence furnished by the Inam Fair Register of Vandrada village. For, as it usually happens in most of such cases neither the original grant which was confirmed by the title deed No. 1082 nor the originals of the other grants which were the basis of the other four title deeds are available. On an examination of the entries in the Inam Fair Register it appears that the inam grant which was confirmed in 1864 by title deed No. 1082 was originally granted by Nabob Mofuz Khan in the year 1739. The area covered by this grant was estimated to be 40 garces in the year 1797. But a few years later—in an account of 1861—the area was calculated as 100 garces. It is not possible to say on the basis of this statement of area that the entire area of the village was included in the original grant by the Nawab. Clearly, therefore, the suit land does not form a whole inam village within the meaning of the main portion of clause (d) which has been set out above. It can still be an estate however if it comes within the *Explanation*. The effect of the *Explanation* was succinctly put in a Full Bench Judgment of the Madras High Court in *Varadaraja Swamivari Temple v. Krishnappa*¹, thus:—

".....Where the grant in inam was of a named village, what was granted would constitute an estate even though the grantee did not have the benefit of the minor inams that lay within the geographical limits of that village, provided it was proved that the grant of the minor inams preceded in point of time the grant of the rest of the village as a named village."

In our opinion, the High Court was clearly right in its view that the original grant has been shown to be of a named village. Apart from the fact that the inam itself is described in Col. 8 of the Inam Register as Vandrada Shrotriem and Agrahar of Vandrada, we get a further fact from the entries in Col. 20 that Mr. Scott's Register of 1207 Fasli shows that the village Vandrada was originally granted in inam to Chatti Venkatachari and others in A.D. 1739 for subsistence. This grant which was later confirmed by the title deed No. 1082 was thus clearly of a named village.

That alone is however not sufficient to make it an estate. It must further appear that the minor inams which covered part of the village, viz., Devadayan 9.25 acres and the personal inams for 3.04 acres had been granted prior to the grant of the rest of the village as a named village.

There is nothing on the record, however, to show the dates of the grants of the minor inams. It is therefore necessary to consider the question of burden of proof. The decision of this Court in *District Board, Tanjore v. Noor Mohd.*², has generally been taken to lay down the law that when the question arises in any case before the Courts whether certain lands constitute an "estate" the burden of proving that they constitute an estate is upon the party who sets up that contention. On a closer examination however it appears that this decision cannot be considered to be an authority for this proposition. The judgment of Mr. Justice Mahajan (as he then was) states "that it was conceded by Mr. Somayya, the learned Counsel for the respondent that the burden of proving that certain lands constitute an "estate" is upon the party who sets up the contention." The judgment proceeded on the basis of this concession by Counsel and contains no discussion on the question and

consequently no pronouncement. The other learned Judge, Mr Justice Chandrasekhara Aiyar has also stated 'that the respondent has not successfully discharged the onus that rests on him to show that Kunanjeri was an "estate" within the meaning of the Act. His view that such onus did rest on the respondent was also apparently based on the concession made by Counsel. It will not be proper therefore to treat the judgment of this Court in *District Board, Tanjore case*¹, as a decision on the question of burden of proof in such cases.

It is now necessary to examine the principle involved in the question. On behalf of the respondent State Mr Ram Reddy contended that a consideration of the scheme of legislation in introducing *Explanation (1)* to section 3 (2) (d) shows that the Legislature intended the Court to presume that when a grant as an inam was expressed to be of a named village the area covered by the grant formed an estate, but that it was open to a party to rebut this presumption by showing that the excluded lands of the village had been granted by the grantor of the major inam after the date of the major grant. It appears that long before this *Explanation* was added to section 3 (2) (d) the Madras High Court (Wallis C J, and Srinivasa Ayyangar, J) held in *Narayanawami Nayadu v Subramanyam*², that as in all the documents the temple was described as the owner of the whole village, the burden was upon the plaintiff to show that the grant was only of the revenue of a portion of the lands in the village and as this burden had not been discharged Venkatapuram Agraharam was an "estate" even though there were minor inams in the village. This decision was given in 1915 and was followed in the Madras High Court till 1943 when in *Adamma's case*³, another Bench held that unless every bit of land in the village was included in the grant, the grant could not be of the whole village and the land granted could not have formed an estate. This later view was followed the same year in *Sun Reddi's case*⁴. It was after this that the present *Explanation (1)* to section 3 (2) (d) was added by the Madras Estates Land (Amendment) Act II of 1945. There was a provision by which the amendment was to be deemed to have effect as from the date when the Madras Estates Land (Third Amendment) Act, 1936, bringing in sub-clause (d) of clause (2) of section 3 in its present form came into force. Mr Ram Reddy argues that the intention of the Amending Act 1945 was to restore fully the view taken in *Narayanawami's case*², and that under the definition of an inam village as explained by the amendment a named village would be presumed to be an inam village, and so an "estate", notwithstanding the existence of certain minor inams. The presumption could however be rebutted by showing that these minor inams were created by the grantor of the major inam subsequent to the creation of the major inam. The argument is undoubtedly attractive. It also finds support from the observations of Subba Rao, J. In *Janakirammaraju v Appalaiah*⁵, where the learned Judge stated that the amendment introduced by the *Explanation* was intended to restore the well settled law disturbed by the decision in *Adamma's case*³. There are other observations in the judgment in *Janakirammaraju's case*⁵, which appear to support even more clearly Mr Ram Reddy's argument that as soon as it was found that the inam grant was of a named village a rebuttable presumption will arise that it formed an estate. On closer examination of the question however we find that it would be reading too much into the *Explanation* to think that the Legislature wanted to create such a presumption. There are a number of reasons which make us hesitate to accept the view that such a presumption was created. The first of these is that when adding the *Explanation* in 1945 the Legislature did not think fit to make any change in section 23 of the Act, under which it shall be presumed where it became necessary in any suit or proceeding to determine whether an inam village or a separated part of an inam village was or was not an estate within the meaning of the Act as it stood before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, that such village was an estate. If when

1 (1952) 2 M.L.J. 586 A.I.R. 1953 S.C. 446
 2 (1915) I.L.R. 39 Mad. 683 29 M.L.J. 478
 3 (1943) 2 M.L.J. 289

4 (1943) 2 M.L.J. 528
 5 I.L.R. (1944) Mad. 980 (1944) 2 M.L.J. 773

adding the *Explanation* to section 3 (2) (d) in 1945 the Legislature had intended to bring into existence a presumption as suggested by Mr. Ram Reddy, nothing was easier than to give effect to such intention by omitting from section 23 the words "as it stood before the commencement of the Madras Estates Land (Third Amendment) Act, 1936" or by adding express terms that "where the grant was expressed to be of a named village the presumption will be that it is an estate until the contrary is shown."

Another reason which makes it difficult for us to accept Mr. Ram Reddy's argument is the actual language used in *Explanation* (1). The last portion of the *Explanation* clearly indicates that the conclusion that the area is an "estate" can be drawn even where the whole of the village is not included in the grant, only if it appears that the portion not included had already been gifted and was therefore lost to the tenure. The addition of the last clause in the *Explanation* brings out the fact that the Legislature did not intend to go quite as far as the High Court had gone in the case of *Narayanaswami Nayadu*¹.

On a consideration of the history of the language used in the *Explanation* and also the circumstances in which the *Explanation* came to be added, we have come to the conclusion that the Legislature being well aware of the difficulties of proving whether the minor grants had been granted prior to or subsequent to the grant of a named village, decided to leave the matter easy as between the contending parties and created no presumption either way.

That being the position, the question on which of the contending parties the burden of proof would lie has to be decided on the relevant provisions of the Evidence Act. Section 101 of the Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proof of that fact shall lie on any particular person.

Applying these principles, we find that the plaintiff who asks the Court for a declaration that the area covered by the title deed No. 1082 is not an estate must prove that it is not an "estate". If no evidence were given on either side the plaintiff would fail. For, we have found that there is no presumption in law either that the area in question is an estate or that it is not an estate. It follows from this that the plaintiff who is to prove that the suit lands do not form an estate must show that the minor inams were granted subsequent to the date of the inam grant of the named village. The plaintiff has clearly failed to discharge this burden.

We have therefore come to the conclusion, though for reasons different from what found favour with the High Court, that the plaintiff's suit has been rightly dismissed.

The appeal is accordingly dismissed. No order as to costs in this Court.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT —P B GAJENDRADGADKAR, K. N. WANCHOO, M. HIDAYATULLAH,
K. C. DAS GUPTA AND J. C. SHAH, JJ

The State of Assam and another

.. Appellants*

v

Bimal Kumar Pandit

.. Respondent

Constitution of India (1950), Article 311 (2)—Scope and effect

In the instant case, it would be plain to the delinquent officer that the issuance of the notice indicating the provisional conclusions of the dismissing authority as to the punishment that should be imposed on him obviously and clearly implies that the findings recorded against him by the enquiring officer have been accepted by the dismissing authority, otherwise there could be no sense and no purpose in issuing the notice under Article 311 (2) of the Constitution of India (1950). The failure to state expressly that the dismissing authority has accepted the findings recorded in the report against the delinquent officer does not justify the conclusion that the notice given in that behalf does not afford a reasonable opportunity to the delinquent officer under Article 311 (2) of the Constitution. Where the dismissing authority purports to proceed to issue the notice against the delinquent officer after accepting the enquiry report in its entirety, it cannot be said that the dismissing authority must say that it has so accepted the report.

In the category of cases, however, where the dismissing authority accepts the findings recorded against the delinquent officer and differs from some or all of those recorded in his favour and proceeds to specify the nature of the action proposed to be taken on its own conclusions it would be necessary that the said conclusions should be briefly indicated in the notice, as the action proposed to be taken would be based not only on the findings recorded against the delinquent officer in the enquiring report but also on the view of the dismissing authority that the other charges not held proved by the enquiring officer are, according to the dismissing authority, proved.

Appeal by Special Leave from the Judgment and Decree dated 22nd January, 1962, of the Assam High Court Civil Rule No. 369 of 1961.

M. C. Setalvad, Senior Advocate, (Naunil Lal, Advocate, with him), for Appellants.

N. C. Chatterjee, Senior Advocate, (D. N. Mukherjee, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The appeal by Special Leave raises a short question about the scope and effect of the provisions contained in Article 311 (2) of the Constitution. The said question arises in this way. The respondent Bimal Kumar Pandit was serving appellant No. 1, the State of Assam, as an Extra Assistant Commissioner, Shillong. On 11th December, 1959, the second appellant, the Chief Secretary to the Government of Assam, served on the respondent a charge-sheet containing eleven specific charges and called upon him to show cause why he should not be dismissed from service or otherwise punished under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules read with Article 311 of the Constitution. The said notice further informed the respondent that the Governor of Assam had been pleased to authorise the Commissioner of Plains Division, Assam to conduct the enquiry and to report to appellant No. 2. On 13th January, 1960, the respondent submitted an elaborate explanation in respect of all the charges. The Commissioner of Plains Division, Assam, then proceeded to hold an enquiry and after considering the evidence adduced before him, he made the report on the 12th April, 1960. In this report the Enquiring Officer found that out of the 11 charges drawn up against the respondent 6 had not been proved and of the remaining 5 charges, two had been fully established—they were charges (7) and (10), and the other three charges—Nos (1), (2) and (4) had been partially established. The report made these findings and proceeded to add that the lapses proved did not cast any serious doubt on the honesty and integrity of the delinquent officer, although the evidence led in respect

of charges (1) and (2) proved his inexperience and that led under charges (2) and (4) showed his irresponsibility. The report further stated that in the circumstances, the two charges which deserved consideration for purposes of punishment were charges (7) and (10); and it ended with the recommendation that in view of the limited scope of the charges proved and of the age and experience of the delinquent officer, the withholding of three increments from his pay would meet the ends of justice in this case.

After this report was received, appellant No. 2 served a second notice on the respondent on the 1st of June, 1960. This notice referred to the disciplinary proceedings held against the respondent and added that the respondent was thereby required under clause (2) of Article 311, of the Constitution to submit his explanation if any, why the penalty of removal from service should not be imposed upon him. The notice further stated that a copy of the report of the Enquiring Officer in the disciplinary proceedings drawn up against the respondent was enclosed. The respondent was told that he had to submit his explanation through the Commissioner of Plains Division, Assam, on or before 18th June, 1960.

On receiving this notice, the respondent submitted his explanation on 21st June, 1960, in respect of the charges which had been held proved by the Enquiring Officer. After considering the explanation thus submitted by the respondent, the Governor of Assam was pleased to reduce in rank the respondent who was on probation in the Assam Civil Service, Class I to the Assam Civil Service, Class II, permanently, with effect from the date he takes over as such. The Governor of Assam further ordered that the respondent will be on probation in the said Class II Service for two years, subject to termination, if his work and conduct were not found satisfactory. The respondent was to draw his pay in the minimum of the scale of pay of A.C.S., Class II and his seniority in the cadre would be determined with effect from the date of his joining. This Order was made on 8th July, 1961.

The respondent then challenged the validity of this order by a writ petition in the High Court of Judicature at Assam on the 24th August, 1961. One of the points urged by him was that he had not been given a reasonable opportunity of showing cause against the action which was ultimately taken against him under Article 311 (2); and he urged that the contravention of Article 311 (2) rendered the impugned order invalid. He urged other contentions also, but those have been rejected by the High Court, while his main point under Article 311 (2) has been upheld. In the result, the High Court has allowed the writ petition and issued a *mandamus* directing the appellant not to give effect to the order dated 8th July, 1961. It is against this order that the appellants have come to this Court by Special Leave.

We have already referred to the second notice served on the respondent under Article 311 (2). The respondent's contention which has been accepted by the High Court is that in the said notice, appellant No. 1 has not clearly indicated that it accepted the findings of the Enquiring Officer; and since such a statement is not made in the notice, the respondent could not have known on what grounds appellant No. 1 provisionally decided to impose upon the respondent the penalty of removal from service. The High Court has held that the notice issued under Article 311 (2) must show that the dismissing authority has applied its mind to the findings of the Enquiring Officer and has accepted the said findings against the delinquent officer. In other words the notice should expressly state the conclusions of the dismissing authority, because unless these conclusions are communicated to the delinquent officer, he would not be able to make an adequate or effective representation. According to the High Court, in recording such conclusions, the dismissing authority must also indicate the reasons on which it had come to those conclusions against the delinquent officer and since the impugned notice did not contain a specific averment that the dismissing authority had accepted the findings of the Enquiring Officer and otherwise gave no grounds or reasons for the action proposed to be taken against the respondent, it contravened the requirements of Article 311 (2) and so, it must be held to be void. Mr. Setalvad for the appellants contends

that in coming to this conclusion, the High Court has misinterpreted the scope and effect of Article 311 (2)

Article 311 (1) provides, *inter alia*, that no person covered by the said sub-article shall be dismissed or removed by an authority subordinate to that by which he was appointed. We are not concerned with the sub-article in the present appeal. Article 311 (2) provides that no such person as specified in Article 311 (1), shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It is now well settled that a public officer against whom disciplinary proceedings are intended to be taken is entitled to have two opportunities before disciplinary action is finally taken against him. An enquiry must be conducted according to the rules prescribed in that behalf and consistently with the requirements of natural justice. At this enquiry the public officer concerned would be entitled to test the evidence adduced against him by cross-examination where necessary, and to lead his own evidence. In other words at this first stage of the proceedings he is entitled to have an opportunity to defend himself. When the enquiry is over and the Enquiring Officer submits his report, the dismissing authority has to consider the report and decide whether it agrees with the conclusions of the report or not. If the findings in the report are against the public officer and the dismissing authority agrees with the said findings, a stage is reached for giving another opportunity to the public officer to show why disciplinary action should not be taken against him. In issuing the second notice the dismissing authority naturally has to come to a tentative or provisional conclusion about the guilt of the public officer as well as about the punishment which would meet the requirement of justice in his case, and it is only after reaching conclusions in both these matters provisionally that the dismissing authority issues the second notice. There is no doubt that in response to this notice the public officer is entitled to show cause not only against the action proposed to be taken against him, but also against the validity or the correctness of the findings recorded by the Enquiring Officer and provisionally accepted by the dismissing authority. In other words, the second opportunity enables the public officer to cover the whole ground and to plead that no case had been made out against him for taking any disciplinary action and then to urge that if he fails in substantiating his innocence the action proposed to be taken against him is either unduly severe or not called for. This position is not in dispute.

The High Court seems to have taken the view that in order that the public officer may have a reasonable opportunity, the dismissing authority must indicate its conclusions on the findings recorded by the Enquiring Officer and must specify reasons in support of them. According to this view, the fact that the copy of the report made by the Enquiring Officer was sent to the delinquent officer along with the notice indicating the nature of the action proposed to be taken against him, does not help to meet the requirement of Article 311 (2). The argument is that unless this course is adopted, it would not be clear that the dismissing authority had applied its mind and had provisionally come to some conclusions both in regard to the guilt of the public officer and the punishment which his misconduct deserved. It may be conceded that it is desirable that the dismissing authority should indicate in the second notice its concurrence with the conclusions of the Enquiring Officer before it issues the said notice under Article 311 (2). But the question which call for our decision is if the dismissing authority does not expressly say that it has accepted the findings of the Enquiring Officer against the delinquent officer, does that introduce such an infirmity in the proceedings as to make the final order invalid? We are not prepared to answer this question in the affirmative. It seems to us that it would be plain to the delinquent officer that the issuance of the notice indicating the provisional conclusions of the dismissing authority as to the punishment that should be imposed on him obviously and clearly implies that the findings recorded against him by the Enquiring Officer have been accepted by the dismissing authority, otherwise there would be no sense and no purpose in issuing the notice under Article 311 (2). Besides, we may add that in the present case, the affidavit made by appellant

No. 2 clearly shows that before the impugned notice was served on the respondent, the Government had accepted the findings of the Enquiring Officer which means that the Government agreed with the Enquiring Officer in regard to both sets of findings recorded by him. Therefore, we do not think that the failure to state expressly that the dismissing authority has accepted the findings recorded in the report against the delinquent officer, justifies the conclusion that the notice given in that behalf does not afford a reasonable opportunity to the delinquent officer under Article 311 (2). On receiving the notice in the present case it must have been obvious to the respondent that the findings recorded against him by the Enquiring Officer had been accepted by the appellants and so, we think it would not be reasonable to accept the view that in the present case, he had no reasonable opportunity as required by Article 311 (2).

We ought, however, to add that if the dismissing authority differs from the findings recorded in the enquiry report, it is necessary that its provisional conclusions in that behalf should be specified in the second notice. It may be that the report makes findings in favour of the delinquent officer, but the dismissing authority disagrees with the said findings and proceeds to issue the notice under Article 311 (2). In such a case, it would obviously be necessary that the dismissing authority should expressly state that it differs from the findings recorded in the enquiry report and then indicate the nature of the action proposed to be taken against the delinquent officer. Without such an express statement in the notice, it would be impossible to issue the notice at all. There may also be cases in which the enquiry report may make findings in favour of the delinquent officer on some issues and against him on other issues. That is precisely what has happened in the present case. If the dismissing authority accepts all the said findings in their entirety, it is another matter; but if the dismissing authority accepts the findings recorded against the delinquent officer and differs from some or all of those recorded in his favour and proceeds to specify the nature of the action proposed to be taken on its own conclusions, it would be necessary that the said conclusions should be briefly indicated in the notice. In this category of cases, the action proposed to be taken would be based not only on the findings recorded against the delinquent officer in the enquiry report, but also on the view of the dismissing authority that the other charges not held proved by the Enquiring Officer are, according to the dismissing authority, proved. In order to give the delinquent officer a reasonable opportunity to show cause under Article 311 (2), it is essential that the conclusions provisionally reached by the dismissing authority must, in such cases, be specified in the notice. But where the dismissing authority purports to proceed to issue the notice against the delinquent officer after accepting the enquiry report in its entirety, it cannot be said that the dismissing authority must say that it has so accepted the report. As we have already indicated, it is desirable that even in such cases a statement to that effect should be made. But we do not think that the words used in Article 311 (2) justify the view that the failure to make such a statement amounts to contravention of Article 311 (2). In dealing with this point, we must bear in mind the fact that a copy of the enquiry report had been enclosed with the notice, and so, reading the notice in a common-sense manner, the respondent would not have found any difficulty in realising that the action proposed to be taken against him proceeded on the basis that the appellants had accepted the conclusions of the Enquiring Officer in their entirety.

It has, however, been urged by Mr. Chatterjee for the respondent that in the present case, the appellants must have proceeded to issue the notice against the respondent after coming to the conclusion that some of the findings recorded in the enquiry report in favour of the respondent were not correct. His argument is that the enquiry report had suggested that the withholding of three increments would meet the ends of justice in the present case, nevertheless the notice issued by the appellants indicated that the action proposed to be taken was the respondent's removal from service. It is true that the ultimate action taken against him was not as severe; he has been merely demoted to Class II Service. But it is suggested that the severity of the punishment proposed to be inflicted on the respondent rather suggests that the appellants felt that some of the other charges which the Enquiring

Officer had not held proved appeared to be proved to the appellants. This argument is no doubt ingenious, but in the circumstances of this case, we do not think it can be accepted. As this Court has held in *A N D Silva v Union of India*¹, in the absence of rules or any statutory provisions to the contrary, the Enquiring Officer is not required to specify the punishment which may be imposed on the delinquent officer. His task is merely to hold an enquiry into the charges and make his report setting forth his conclusions and findings in respect of the said charges. Sometimes the Enquiring Officers do indicate the nature of the action that may be taken against the delinquent officer, but that ordinarily is outside the scope of the enquiry. That being so, not much significance can be attached to the recommendation made by the Enquiring Officer in the present case. Besides, it is absolutely clear that under the relevant rules, the punishment proposed to be imposed on the respondent was justified even on the findings recorded against him by the Enquiry Officer, and so it would be idle to contend that unless the appellants had differed from the conclusions of the Enquiring Officer in respect of the charges which he held not proved they could not have legitimately thought of imposing the said punishment on him. Therefore, in our opinion, the argument that the action proposed to be taken itself shows that the appellants did not accept the findings recorded by the Enquiring Officer in favour of the respondent must be rejected.

We will now refer to some of the decisions on which Mr Chatterjee relied. In the case of *The High Commissioner of India v I M Lal*², the Federal Court had to consider the scope and effect of the provisions of section 240 (3) of the Constitution Act, 1935. This provision is substantially similar to the provisions contained in Article 311 (2) of the Constitution. According to the majority view of the Federal Court in the case, all that section 240 (3) required was not only notification of the action proposed but of the grounds on which the authority was proposing that the action should be taken, and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it was proposed to be taken. Mr Chatterjee contends that this decision shows that the notice served on the delinquent officer must set forth the grounds on which the particular action was proposed to be taken. He emphasises the fact that in the judgment it has been specifically stated that the grounds should be stated on which the action is proposed to be taken, and that clearly shows that the dismissing authority must indicate its reasons in support of the said action. In our opinion, this argument is not justified, because the context in which the said observations were made by the Federal Court clearly shows that the grounds to which the judgment refers are the findings or conclusions reached by the Enquiring Officer. In fact, in the subsequent passage, it has been expressly observed that the requirement of section 240 (3) involves

"in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full or adequately summarised form, the results of that enquiry, and the findings of the Enquiring Officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction in rank."

It would be noticed that this statement clearly shows that what the Federal Court held was that the dismissing authority must convey to the delinquent officer the findings of the Enquiring Officer either fully, or adequately summarised, and state the nature of the action proposed to be taken against him. In other words, the officer concerned ought to know what findings have been recorded against him and should be given a chance to challenge those findings and to question the propriety of the action proposed to be taken against him. In this context, therefore, the grounds which, according to the judgment, have to be stated in the notice do not indicate grounds or reasons which would show why the dismissing authority accepts the Enquiring Officer's report, but the grounds, reasons, or findings which have been recorded by the Enquiring Officer are required to be stated. Therefore, we do not think that Mr Chatterjee is justified in contend

ing that the decision of the Federal Court in *I.M. Lal's case*¹ supports the view taken by the High Court in the present proceedings.

It is true that in the case of *Khem Chand v. The Union of India and others*², this Court has held that:

"Reasonable opportunity envisaged by Article 311 (2) includes, *inter alia*, an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant, tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant."

There is no doubt that after the report is received, the appropriate authority must apply its mind to the report and must provisionally decide whether the findings recorded in the report should be accepted or not. It is only if the findings recorded in the report against the Government servant are accepted by the appropriate authority that it has to provisionally decide what action should be taken against him. But this does not mean that in every case, the appropriate authority is under a constitutional obligation to state in the notice that it has accepted the adverse findings recorded by the Enquiring Officer before it indicates the nature of the action proposed to be taken against the delinquent officer. Therefore, we do not think that the decision of this Court in *Khem Chand's case*², supports Mr. Chatterjee's contention.

On the other hand, the decision of this Court in *The State of Orissa and another v. Govindadas Panda*³, shows that a similar order issued by the Orissa Government was upheld by this Court. In that case, the notice issued under Article 311 (2) did not expressly state that the State Government had accepted the findings recorded by the Enquiring Officer against the Government servant in question. In fact, even the nature of the punishment which was proposed, to be inflicted on him was not specifically and clearly indicated. The Orissa High Court had struck down the order of dismissal on the ground that the notice was defective and so, the provisions of Article 311 (2) had been contravened. This Court in reversing the conclusion of the Orissa High Court, observed that

"In the context, it must have been obvious to the respondent that the punishment proposed was removal from service and the respondent was called upon to show cause against that punishment. On a reasonable reading of the notice, the only conclusion at which one can arrive is that the appellant (the State) accepted the recommendation of the Administrative Tribunal and asked the respondent to show cause against the proposed punishment, namely, that of removal from service."

It may be added incidentally that the punishment which had been suggested by the Tribunal was removal from service, as distinguished from dismissal, and this Court held that the impugned notice must be deemed to have referred to that punishment as the action proposed to be taken against the Government servant. Therefore, this decision, in substance, is against the contention raised by Mr. Chatterjee.

There are, however, some decisions which seem to lend support to Mr. Chatterjee's argument and it is, therefore, necessary to examine them. In the case of *The State of Andhra v. T. Ramayya Suri*⁴, the Andhra Pradesh High Court has held that

"Under Article 311 (2) the authority concerned should necessarily in its order requiring the civil servant to show cause give not only the punishment proposed to be inflicted but also the reasons for coming to that conclusion."

If this observation is intended to lay down a general rule that in every case the appropriate authority must state its own grounds or reasons for proposing to take any specific action against the delinquent Government servant, we must hold that the said view is not justified by the requirements of Article 311 (2). We ought, however, to add that in the case with which the Andhra Pradesh High Court was dealing,

1. (1945) 2 M.L.J. 270 : (1945) F.L.J. 129 : (1945) F.C.R. 103 at p. 136.

2. (1958) S.C.J. 497 : (1958) 1 M.L.J. (S.C.) 169 : (1958) 1 An.W.R. (S.C.) 169 : (1958) S.C.R. 1080 at 1097.

3. Civil Appeal No. 412 of 1958 decided on 10th Dec. 1958.

4. (1957) 1 An.W.R. 187 : A.I.R. 1957 Andh 370.

it appeared that the Government did not agree with the Tribunal in regard to its finding on the third charge and so, its conclusion on the said charge, which was different from that of the Tribunal, weighed in its mind in proposing to take the specified action against the Government servant. In such a case, it would be legitimate to hold that the public servant did not know what was weighing in the mind of the Government and so, did not get an adequate opportunity to challenge the view which the Government was inclined to take in respect of the third charge framed against him. On these facts we think, the High Court was justified in taking the view that the Government should have indicated in the notice its conclusion on the third charge. That however, does not mean that in the notice, the Government ought to state its grounds or reasons in support of its conclusion. It is the finding or the conclusion which is weighing in the mind of the Government that must, in such a case, be communicated to the public servant.

In *Bimal Charan Mitra v State of Orissa and another*¹, the Orissa High Court has held that

"The service of the copy of the findings of the punishing authority on the public servant is mandatory and the service of the report of the Enquiring Officer who is not the punishing authority when there is no indication at all in the notice that the authority competent to punish agrees with those findings cannot constitute substantial compliance with the requirements of Article 311 (2)."

This decision seems to suggest that in issuing the notice under Article 311 (2), the appropriate authority must, besides serving the copy of the Enquiring Officer's report on the Government servant, supply the said officer the finding of the punishing authority and this requirement is treated as a mandatory requirement under Article 311 (2). In our opinion, this view is erroneous.

The same comment falls to be made about another decision of the said High Court in *Krishan Gopal Mukherjee v The State*².

The last decision to which reference must be made is the decision of the Bombay High Court in the *State of Bombay v Gajanan Mahadev Badley*³. In this case Chief Justice Chagla has observed that under Article 311 (2) it is not sufficient that the State should call upon the servant to show cause against the quantum of punishment intended to be inflicted upon him, the State must also call upon the servant to show cause against the decision arrived at by a departmental enquiry if that decision constitutes the ground on which the Government proposes to take action against the servant. This view is clearly right. But then in support of this conclusion, the learned Chief Justice has observed that the public servant must have an opportunity to show cause not only against the punishment but also against the grounds on which the State proposes to punish him, and Mr Chatterjee relies upon this sentence to support his argument that the grounds on which the State proposes to act must be communicated to the public servant. In our opinion the statement must be read along with the conclusion of the High Court and so read, it would clearly show that what the Chief Justice intended to lay down was that the findings recorded in the enquiry report which constitute the ground on which the Government proposes to take action must be communicated to the public servant. Therefore, this decision does not support Mr Chatterjee's argument that the notice issued under Article 311 (2) must expressly state that the appropriate authority accepts the findings of the Enquiry Officer and must give reasons in support of the action proposed to be taken against him.

In the result, we hold that the High Court was in error in coming to the conclusion that the order of demotion passed against the respondent in the present case was invalid on the ground that the respondent had not been given a reasonable opportunity of showing cause against the said action under Article 311 (2). The appeal accordingly succeeds, the order passed by the High Court is set aside and the writ petition filed by the respondent is dismissed. There will be no order as to costs.

K.L.B

Appeal allowed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. Hidayatullah and J. C. Shah, JJ.

V. N. Vasudeva

.. Appellant*

v.

Kirori Mal Luhariwala

.. Respondent.

Delhi Rent Control Act (LIX of 1958), section 15 (1)—Order directing tenant to deposit arrears of rent—Only an interlocutory order pending trial of proceeding.

An order directing the tenant to deposit the arrears of rent under section 15 (1) of the Delhi Rent Control Act in an application under section 14 of that Act is not a final order but is preliminary to the trial of the case. For the purpose of an interim order, it is not necessary that there should have been a full trial.

Appeal by Special Leave from the Judgment and Order dated 2nd September, 1963 of the Punjab High Court (Circuit Bench) at Delhi in L.P.A. No. 119-D of 1963.

S. T. Desai, Senior Advocate (*J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

H. N. Sanyal, Solicitor-General of India (*B. P. Maheshwari*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by Special Leave against the order of the High Court, Punjab dated 14th August, 1963, by which an order of the Rent Controller under section 15 (1) of the Delhi Rent Control Act, 1958 directing the appellant to deposit back rents at Rs. 300 per month from 1st July, 1957 was confirmed. The High Court granted the appellant one month's time from the date of its own order, as the original time had already run out.

The appellant is an Advocate, who is practising at Delhi. He is occupying No. 43, Prithvi Raj Road, New Delhi as a tenant, and his landlord Seth Kirori Mal Luhariwala is the respondent in this appeal. The tenancy commenced on 28th July, 1957 and the memorandum of tenancy dated 1st July, 1957 produced in the case, shows that the premises were taken on a monthly rent of Rs. 300. The memorandum also contains other terms which need not be mentioned here, because they are not relevant to the present appeal. It appears that Seth Kirori Mal was in arrears in payment of his income-tax, and a sum of Rs. 39,00,000 was outstanding from him. On 31st October, 1957, the Income-tax Officer, Central Circle, New Delhi, to whom all cases of Seth Kirori Mal were transferred, issued a notice to the appellant under section 46 (5-A) of the Indian Income-tax Act directing him to deposit with the Income-tax Officer all sums due by way of rent as also future rents. The appellant sent no reply to this notice. He had, however, on 29th September, 1957, addressed a letter to the respondent Seth Kirori Mal. The reply of Kirori Mal dated 15th October, 1957 figured in the arguments a great deal, and as it is brief, it may be quoted here :

"From

To

.....

Dated Raigarh, the 15th October, 1957.

Dear Sir,

With reference to letter No. M-17-58 dated 29th September, 1957, I am to write that you may please adjust six months' rent of 43, Prithviraj Road, New Delhi, i.e., Rs. 1,800 (rent from 1-10-1957 to 31-3-1958) towards your professional fee in part payment thereof. The balance of your fee will be paid later at the time of final settlement.

Yours faithfully
(Sd.) Paluram Dhanania
for Kirori Mal Luhariwala".

Kirori Mal also sent a receipt dated 16th October, 1957 for the amount, and it is item 23 in the record

Kirori Mal had litigation in Calcutta. He had brought a suit against four defendants claiming the present property as his "absolute" and "exclusive self-acquired property". The case was pending in the High Court and on 1st May, 1958 an order was made appointing one Chakravarti as a Receiver of the properties including No 43, Prithvi Raj Road. Chakravarti also sent a notice on 8th July, 1958 to the appellant demanding rent already due and also due and when due. To this notice the appellant sent a reply on 19th July, 1958. He referred to the payment of rent by adjustment towards fees for the period 1st October, 1957 to 31st March, 1958, which was the subject of the letter above. He stated that as regards rent after 1st April, 1958 he had no objection to pay the amount to the Receiver or any other claimant but regreted that it was not possible for him to make the payment because of the notice served upon him by the Income tax Officer. He asked the Receiver to get the notice withdrawn, and stated that he would be glad to remit the amount of rent to him when that was done. He also raised the question of certain other expenses which he had incurred in connection with the house which he claimed he was entitled to deduct from the rent and informed that a few repairs were required in the house. A second letter was sent by the Official Receiver on 5th September, 1959 making another demand. In his reply dated 14th September, 1959 to this letter, the appellant raised the question that a sum of Rs 23 500 was payable to him for professional services rendered by him to Seth Kirori Mal. He stated

' You will therefore appreciate that I am entitled to adjust the rent payable against the fees due to me and the amount due to me will absorb the rent for a little over six years

Even before this Seth Kirori Mal had paid me a sum of Rs 1 800 by way of adjustment of rent towards my professional fees due. You will, therefore kindly agree that the rent payable is adjustable against the professional fee due to me.'

With this letter, he enclosed a copy of a statement of fees amounting to Rs 23 500 which he had submitted to his client on 4th February, 1959. The Official Receiver then informed the appellant that the party concerned had denied the claim for fees as absolutely false, and observed in his letter that the professional fees should be the subject of some other proceeding but the rent should be paid without delay. He enquired if the amount of rent had been paid to the Income-tax Department in response to the notice. In his reply to this letter, on 5th July, 1960 the appellant for the first time stated that there was an agreement between him and Seth Kirori Mal to adjust the rent towards his professional fees until the fees were fully paid. He offered to reduce the fees if Seth Kirori Mal had any objection, but stated that till the professional fees were recouped no rent could be considered to be due from him.

On 25th November, 1960, Seth Kirori Mal applied to the High Court at Calcutta for directions to the Official Receiver to take appropriate proceedings to realise the arrears of rent from the appellant, and on 19th December, 1960, the High Court appointed Seth Kirori Mal Receiver in the case Seth Kirori Mal then served a notice on 23rd December, 1960 on the appellant to pay the arrears of rent. To this notice, the appellant sent a detailed reply which, in substance, has been his defence in the proceedings before the Rent Controller, from which the present appeal has arisen.

On 4th January, 1961, Seth Kirori Mal made an application under section 14 of the Delhi Rent Control Act before the Rent Controller, Delhi. In his written statement in reply to that application, the appellant pleaded that Seth Kirori Mal had no right to recover rent from him inasmuch as a notice under section 46 (5 A) of the Indian Income tax Act had been issued by the Income tax Officer, Central Circle V, New Delhi. He pleaded that the property was in the custody of the Court, and that inasmuch as a Receiver had been appointed Kirori Mal had no *locus standi* to maintain the petition denying at the same time that Kirori Mal had informed him that he had been appointed a Receiver of the property. The

appellant also contended that under the Rent Control Act, a Receiver had no right to act on behalf of the landlord. He referred to the alleged agreement by which fees were to be recouped from rent as and when it fell due, pointing out that on an earlier occasion a sum of Rs. 1,800 was allowed to be adjusted towards fees. Some other pleas were raised, but it is not necessary to refer to them, because they were not raised before us.

The notice to quit which the appellant alleged was not issued to him was filed in the Court of the Controller on 17th May, 1961. The appellant was ordered to inspect it and to be ready for his statement as to the correctness of the notice. On the next date, a statement of the appellant was recorded and he denied the notice and also its receipt. The case was then set down for arguments, and after hearing the arguments, the Rent Controller passed his order on 22nd July, 1961. The Rent Controller held that there was no proof on the file to show that the respondent had any right to make an adjustment of the rent against his professional dues. He held that the rent was not paid after 31st March, 1958. With regard to the plea that a notice under section 46 (5-A) of the Income-tax Act, 1922 had been issued, the Rent Controller, observed that the amount, if deposited in his Court, would not be paid to Kirorimal unless he produced a clearance certificate from the Income-tax Department. The Rent Controller also said that if in the enquiry to be subsequently made, the tenant proved that the amount of fees had to be recouped from rent, the amount would not be paid to Kirorimal.

Against the decision of the Rent Controller, the appellant filed an appeal before the Rent Control Tribunal. The Rent Control Tribunal affirmed the decision of the Controller, observing that the plea taken by him that his professional fees were to come out of rent was an after-thought and there was no evidence to prove that there was such an agreement between the parties. On other matters, the Tribunal expressed its agreement with the Rent Controller. The appellant then appealed to the High Court of Punjab. The High Court upheld the orders so far made and pointed out that in the letter dated 19th July, 1958, to the Receiver, the appellant had not mentioned the agreement. The High Court held that the order made under section 15 (1) of the Act was proper, because it was an admitted fact that rent had not been paid to anybody from 1st April, 1958. The High Court endorsed the view of the Tribunals below that the notice of the Income-tax Officer did not come in the way of making the deposit of the rent in the Office of the Rent Controller, because the amount was not to be paid to any one till the Rent Controller had decided who was entitled to receive it. The appeal was therefore dismissed.

In this Court, emphasis is laid upon the letter of 15th October, 1957, by Kirorimal in which there was an adjustment of Rs. 1,800 towards fees. It was contended that there was an oral agreement to use the rent to pay the professional fees. The letter itself does not show that there was any such agreement. In fact it shows the contrary where it says :

“ The balance of your fees will be paid later at the time of final settlement.”

This shows that the appellant was not entitled to retain the rent in his hands, and the Tribunals below were justified in saying that the plea about the so-called agreement was an after-thought, because till 14th September, 1959, the appellant had not mentioned such an agreement. We are also satisfied that the plea was a mere device to retain the money and to avoid paying the rent. It must be remembered that there were as many as four claimants, viz., the Income-tax Officer, the Receiver and Kirorimal in person and Kirorimal as Receiver, but the appellant avoided each of these in turn by pointing to the others, and in this way continued to occupy the premises without payment of any rent.

It was contended however as a matter of law that a proper opportunity ought to have been given to the appellant to prove his plea by leading evidence before ordering that the rent be deposited. Mr. S.T. Desai contended that under section 15 (1) of the Delhi Rent Control Act, an order for deposit of arrears of rent can only be made after the tenant has been given an opportunity of being heard, because

if the tenant makes a payment or deposit as required of him, the landlord is entitled to take the amount of the deposit and the Controller can award such costs as he may deem fit to the landlord and the case comes to an end. By way of contrast, he pointed out that the case proceeds if the tenant fails to make the payment or deposit as required of him. In other words, it was contended that an order under section 15 (1) for deposit of rent should only be made at the end of the case and not at an interlocutory stage. Mr Desai contended that the present order was made at an interlocutory stage and it was wrong, because if the tenant deposited the money, there would be no further hearing and his plea that there was an agreement between the parties that the rent as and when it fell due should be set-off against the professional fees, would remain untried. In our opinion, this reading is not permissible.

Section 15 (omitting such parts as are unnecessary for the present purpose) reads as follows —

"Section 15 — (1) In every proceeding for the recovery of possession of any premises on the ground specified in clause (a) of the Proviso to sub-section (1) of section 14, the Controller shall, after giving the parties an opportunity of being heard, make an order directing the tenant to pay to the landlord or deposit with the Controller within one month of the date of the order, an amount calculated at the rate of rent at which it was last paid for the period for which the arrears of the rent were legally recoverable from the tenant including the period subsequent thereto up to the end of the month previous to that in which payment or deposit is made and to continue to pay or deposit month by month, by the fifteenth of each succeeding month, a sum equivalent to the rent at that rate."

(3) If, in any proceeding referred to in sub-section (1) or sub-section (2), there is any dispute as to the amount of rent payable by the tenant, the Controller shall, with fifteen days of the date of the first hearing of the proceeding, fix an interim rent in relation to the premises to be paid or deposited in accordance with the provisions of sub-section (1) or sub-section (2), as the case may be, until the standard rent in relation thereto is fixed having regard to the provisions of this Act, and the amount of arrears, if any, calculated on the basis of the standard rent shall be paid or deposited by the tenant within one month of the date on which the standard rent is fixed or such further time as the Controller may allow in this behalf.

(6) If a tenant makes payment or deposit as required by sub-section (1) or sub-section (3), no order shall be made for the recovery of possession on the ground of default in the payment of rent by the tenant but the Controller may allow such costs as he may deem fit to the landlord.

(7) If a tenant fails to make payment or deposit as required by this section the Controller may order the defence against eviction to be struck out and proceed with the hearing of the application."

It will be noticed that sub-section (3) also contemplates payment of interim rent determined by the Controller before the entire dispute is settled. Sub-section (6) puts the case under sub-section (1) and sub-section (3) on the same footing and makes no distinction between them. It is also possible to visualise cases in which the tenant may deposit the amount of rent under protest and claim that his defence be tried. It is not that even on the deposit of the arrears of rent in these circumstances the case would come to an end. The latter part of sub-section (1) further shows that not only the arrears have to be deposited but rent as it falls due has to be deposited month by month by the 15th of each succeeding month. This also shows that the order under sub-section (1) is not a final order but is preliminary to the trial of the case and is made only where the rent has in fact not been paid. For the purpose of an interim order it was not necessary that there should have been a full trial. The Rent Controller had the affidavit of the appellant and he could judge whether in the circumstances of the case, an interim order ought or ought not to be made. He came to the conclusion that the rent was not paid and the plea that it was being withheld under an agreement was an after-thought and not true. The High Court and the Rent Control Tribunal have agreed with this view of the Rent Controller and the conclusion appears to us to be sound. Once such a conclusion is reached, it is quite manifest that the order was made after affording an opportunity to the appellant to be heard. No doubt, the appellant is entitled to lead oral evidence in regard to the agreement he alleges, but for that he will have

an opportunity hereafter. At the moment, he is being asked to deposit the arrears in Court, which admittedly are outstanding.

Mr. Desai next contended that the notice under section 46 (5-A) amounted to a garnishee order and the appellant could not, while the notice stood, make any payment without incurring personal liability. There was no question of a personal liability because the Rent Controller had stated in his order that the amount would not be paid to anyone till the clearance certificate was obtained from the Income-tax Department. The Rent Controller had informed the Income-tax Authorities and the appellant ran no risk in depositing the arrears of rent in the circumstances.

It was contended that the notice under section 46 (5-A) amounted to an attachment of the rent in the hands of the appellant and reference was made to the provisions of section 46, sub-section (5-A) para 5. The argument overlooks the next para which provides :

"Where a person to whom a notice under this sub-section is sent objects to it on the ground that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then nothing contained in the section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, to the Income-tax Officer."

If there was an agreement between the parties and Kirorimal was indebted for such a large amount, the appellant could have objected on the ground that he did not hold any money for or on account of the assessee and then he would not have been required to pay any sum to the Income-tax Officer. The appellant did nothing in the matter except to deny the payment to everyone. He paid nothing to the Income-tax Officer, declined to deposit the money before the Rent Controller and refused to recognise the demands by the Receiver and his landlord. In other words, he was trying to take full advantage of the law, when he could have informed the Income-tax Officer about his own position and paid the money to the Rent Controller subject to its being paid to the Income-tax Department.

Reference was made in this connection to a decision of the Calcutta High Court reported in *Nalinakhya Bysack and another v. Shyam Sunder Halder and others*¹, in which Harries, C.J., observed that before making an order for the deposit of the rent, a full enquiry should be made. That was a case in which the tenant had pleaded that there was an agreement between him and the landlord that any amount spent on repairs would be set-off against the rent. Harries, C.J., held that without ascertaining the truth of the plea that a large sum had been spent on repairs, an order to deposit the entire arrears of rent ought not to have been made. It is quite clear that the facts there were entirely different. Payment by the landlord for repairs was a part of the tenancy agreement and rent under the tenancy could not be calculated without advertence to every term of the agreement of tenancy. Here the special agreement which is pleaded is outside the tenancy agreement and allegation about the special agreement has been held to be an after-thought and false. It is therefore difficult to apply the ruling to the present circumstances.

The appeal is wholly devoid of merit and it is dismissed with costs. By the consent of parties, a period of two months from the date of hearing (20th December, 1963) was granted to the appellant to deposit the arrears of rent from 1st April, 1958, in the Court of the Rent Controller.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, *Chief Justice*, K N. WANCHOO, K C. DAS GUPTA, J C SHAH AND N RAJAGOPALA AYYANGAR, JJ.

M/s Shree Bajrang Jute Mills Ltd, Guntur

.. Appellant*

The State of Andhra Pradesh represented by Deputy Commissioner of Commercial Taxes, Guntur

.. Respondent

Constitution of India (1950), Article 286—Explanation—Delivery within state of Railway Receipts against payment for goods consigned to places outside the State for consumption outside the State—If goods can be deemed to be 'actually delivered' within the State authorising levy of sales tax—Sale of Goods Act (III of 1930), section 39—Applicability

No doubt under section 39 of the Sale of Goods Act where, in pursuance of a contract of sale the seller is authorised to send the goods to the buyer delivery of the goods to a carrier for the purpose of transmission to the buyer, is *prima facie* deemed to be delivery of the goods to the buyer. But that provision will not make mere delivery of the railway receipts representing title to the goods "actual delivery of goods" for the purpose of Article 286 of the Constitution. The rule contained in section 39 (1) of the Sale of Goods Act raises a *prima facie* inference that the goods have been delivered if the conditions prescribed thereby are satisfied, it has no application in dealing with a constitutional provision which while imposing a restriction upon the legislative power of the States entrusts exclusive power to levy sales tax to the State in which the goods have been actually delivered for the purpose of consumption.

Appeal from the Judgment and Order dated 7th April, 1960, of the Andhra Pradesh High Court in Tax Revision Case No 27 of 1958.

M C. Setalvad, Senior Advocate, (K. Srinivasamurthy and Naunit Lal, Advocates, with him), for Appellant.

A. Ranganadham Chetty, Senior Advocate, (B R. G K. Achar, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—With certificate of fitness granted by the High Court of Andhra Pradesh this appeal is preferred by Shree Bajrang Jute Mills Ltd.

The appellant is engaged in the manufacture of jute goods, and is a registered dealer under the Madras General Sales Tax Act. For the assessment year 1954-55 the appellant submitted its return for sales tax claiming a deduction of Rs. 21,80,118-1-3 from the turnover in respect of the jute goods supplied by rail to the Associated Cement Company Ltd.—hereinafter for the sake of brevity called 'the A.C.C.' under despatch instructions from that Company. The Commercial Tax Officer rejected the claim of the appellant for deduction and that order was confirmed in appeal to the Deputy Commissioner of Commercial Taxes. In appeal to the Sales Tax Appellate Tribunal, the order was reversed, the Tribunal holding that the appellant was entitled to exemption in respect of the turnover for the goods supplied to the A.C.C. A revision petition presented against the order to the High Court of Andhra Pradesh was heard with a large number of other petitions which raised certain common questions. The High Court reversed the order of the Tribunal and restored the order passed by the Deputy Commissioner of Commercial Taxes.

The factory of the appellant is situated at Guntur. The A.C.C. owns cement factories at many places (including one at Tadepalli in the State of Andhra called the Krishna Cement Works) and for the purpose of marketing its products it requires jute packing bags. For securing a regular supply of jute bags, the A.C.C. entered into a contract with the appellant of which the following four conditions are material:

- "1. All the goods are sold F O R. Guntur unless otherwise expressly stated in this contract.
2. Goods to be packed.....well pressed and marked inbound bales of..... per each.

3. Payments to be made in cash, in exchange for Mills Delivery Order on sellers on due date or for Railway receipts or for Dock receipts, or for Mate's receipts, (which Dock receipts or Mate's receipts are to be handed by a Dock's or Ship's Officer to the seller's representative).

4. The buyers agree that the property in the goods sold shall not pass from the sellers to the buyers, so long as the sellers are in possession of any bills of lading, railway receipts, dock-warrants or Mate's receipts or any other document of title whether such documents are in the names of sellers or buyers, until payment is made in full.

(a) The buyers agree that the risk of loss, deterioration or damage in the goods during transit whether by land or canal or sea or when the goods are in the custody of the seller or any third person in a warehouse, dock or any premises shall be borne by the buyers notwithstanding that the property in the goods does not pass to the buyers during such transit or custody."

As and when the gunny bags were needed for packing its products the A.C.C. issued despatch instructions calling upon the appellant to send jute bags by railway to the cement factories of the A.C.C. outside the State of Andhra. Pursuant to those instructions the appellant loaded the goods in the railway wagons, obtained railway receipts in the name of the A.C.C. as consignee and against payment of the price, delivered the receipts to the Krishna Cement Works, Tadepalli—which, it is common ground, was for the purpose of receiving the railway receipts and making payment, the agent of the A.C.C. It is also common ground that the jute bags were sold to the A.C.C. for the purpose of packing cement by the factories of the A.C.C. to which they were sent and not for any other purpose.

The assessing authority and the Deputy Commissioner held that as the railway receipts were delivered to the agent of the buyer within the State of Andhra, and price was also realized from the agent of the buyer within the State, the goods must be deemed to have been delivered to the buyer in the State of Andhra, and the appellant was liable to pay sales tax on the price of the goods sold. With that view the High Court agreed.

Under the Government of India Act, 1935, the Legislatures of every Province could legislate for levying tax on sales of goods in respect of all transactions, whether the property in the goods passed within or without the Province, provided the Province had a territorial nexus with one or more elements constituting the transaction of sale; *Poppat Lal Shah v. The State of Madras*¹ and *The Tata Iron and Steel Company Ltd. v. State of Bihar*². But this resulted in simultaneous levy of sales tax by many Provinces in respect of the same transaction each fixing upon one or more elements constituting the sale, with which it had a territorial nexus. With the dual purpose of maintaining an important source of revenue to the States, and simultaneously preventing imposition of an unduly heavy burden upon the consumers by multiple taxation upon a single transaction of sale, the Constitution made a special provision imposing restrictions upon the legislative power of the States in Article 286 which as originally enacted ran as follows:—

"(1) No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State or

(b) in the course of the import of the goods into, or export of the goods out of the territory of India.

Explanation.—For the purposes of sub-clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

1. (1953) S.C.J. 369 : (1953) 1 M.L.J. 739 : (1953) S.C.R. 677.

2. (1958) S.C.J. 818 : (1958) S.C.R. 1355.

After the enactment of the Constitution, by a Presidential Order the Provincial Sales Tax Acts were made to accord with the restrictions imposed by Article 286 of the Constitution. It is manifest that by Article 286 the legislative authority of the States to impose taxes on sales and purchases was restricted by four limitations in respect of sales or purchases outside the State, in respect of sales or purchases in the course of imports into or exports out of India, in respect of sales or purchases which take place in the course of inter State trade or commerce and in respect of sales and purchases of goods declared by Parliament to be essential for the life of the community. These limitations may overlap, but the power of the State to tax sale or purchase transactions may be exercised only if it is not hit by any of the limitations. The restrictions are cumulative.

The sales in the present case are not sales which have taken place in the course of inter State trade or commerce. The only point of contest is whether they are "outside the State" of Andhra. It is now well settled that by Article 286 (1) (as it stood before it was amended by the Constitution Sixth Amendment Act, 1956) sales as a direct result of which goods were delivered in a State for consumption in such State, i.e., the sales falling within the *Explanation* to Article 286 (1) were fictionally to be regarded as inside that State for the purpose of clause (1) (a) and so within the taxing power of the State in which such delivery took place and being outside all other States exempt from sales tax by those other States. *Toba Co. Manufacturers (India) Ltd. v. The Commissioner of Sales Tax Bihar, Patna*¹, *Indian Copper Corporation Ltd. v. The State of Bihar and others*², and *The State of Kerala and others v. The Cochin Coal Company Ltd.*³ But the *Explanation* is not exhaustive of what may be called "inside sales". Clause (1) (a) excludes from the reach of the power of the States sales outside the State but it does not follow from the *Explanation* that it localises the *situs* of all sales. The power of the State under Entry 54, List II of the Seventh Schedule to tax sales (not falling within clauses (1) (b), (2) and (3), which are outside the *Explanation* and which may for the sake of brevity be called 'non *Explanation*' sales, remains unimpaired. It is not necessary for the purpose of this case to express an opinion, whether the theory of territorial nexus of the taxing State, with one or more elements which go to make a completed sale authorises since the promulgation of the Constitution the exercise of legislative power under Entry 54, List II of the Seventh Schedule to tax sales, where property in goods has not passed within the taxing State.

The question which then falls to be determined is whether the sales to the A.C.C. by the appellant may be regarded as "non *Explanation* sales". There can be no doubt that if the goods were delivered pursuant to the contracts of sale outside the State of Andhra for the purpose of consumption in the State into which the goods were delivered, the State of Andhra could have no right to tax those sales by virtue of the restriction imposed by Article 286 (1) (a) read with the *Explanation*.

The facts found by the taxing authorities clearly establish that property in the goods despatched by the appellant passed to the A.C.C. within the State of Andhra when the railway receipts were handed over to the agent of the A.C.C. against payment of price. The question still remains: Were the transactions 'non *Explanation* sales', i.e., falling outside the *Explanation* to Article 286 (1)? To attract the *Explanation* the goods had to be actually delivered as a direct result of the sale for the purpose of consumption in the State in which they were delivered. It is not disputed that the goods were supplied for the purpose of consumption outside the State of Andhra and in the States in which they were supplied. It is submitted that the goods were actually delivered within the State, when the railway receipts were handed over to the agent of the buyer. But the expression "actually delivered" in the context in which it occurs, can only mean physical delivery of the goods, or such action as puts the goods in the possession of the purchaser. It does not contemplate mere symbolical or notional delivery, e.g., by entrusting the goods to a

¹ (1961) 2 S.C.R. 106

² (1961) 1 S.C.J. 457 (1961) 2 S.C.R. 276

³ (1961) 2 S.C.J. 20 (1961) 2 S.C.R. 219

common carrier, or even delivery of documents of title like railway receipts. In *C. Govindarajulu Naidu and Company v. State of Madras*¹, Venkatarama Ayyar, J., dealing with the concept of actual delivery of goods, so as to attract the application of the Explanation to Article 286 (1) (a) rightly observed :

"In the context it can mean only physical delivery and not constructive delivery such as by transfer of documents of title to the goods. The whole object of the Explanation is to give a power of taxation in respect of the goods actually entering the State for the purpose of use therein and it will defeat such a purpose of notional delivery of the goods as by transfer of documents of title to the goods within the State is held to give the State a power to tax, when the goods are actually delivered in another State."

A similar view has been expressed in two other cases : *M/s. Capco Ltd. v. The Sales Tax Officer and another*² and *Khaitan Minerals v. Sales Tax Appellate Tribunal for Mysore*.³

Council for the respondent-State relied upon section 39 of the Indian Sale of Goods Act, 1930, which provides in so far as it is material, by the first sub-section that where, in pursuance of a contract of sale, the seller is authorised to send the goods to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer, is *prima facie* deemed to be delivery of the goods to the buyer. But that provision will not make mere delivery of the railway receipts representing title to the goods actual delivery of goods for the purpose of Article 286. The rule contained in section 39 (1) of the Indian Sale of Goods Act raises a *prima facie* inference that the goods have been delivered if the conditions prescribed thereby are satisfied : it has no application in dealing with a constitutional provision which while imposing a restriction upon the legislative power of the States entrusts exclusive power to levy sales tax to the State in which the goods have been actually delivered for the purpose of consumption.

The High Court was therefore in error in inferring from the fact that the property had passed within the State of Andhra against delivery of the railway receipts, that the goods were actually delivered within the State. If the inference raised by the High Court that the goods were actually delivered within the State of Andhra cannot be accepted, on the facts found there is no escape from the conclusion that the State of Andhra had no authority to levy tax in respect to those sale transactions in which the goods were sent under railway receipts to places outside the State of Andhra and actually delivered for the purpose of consumption in those States.

The appeal must therefore be allowed. The order of the High Court is set aside and the order of the Appellate Tribunal is restored. The appellant to get its costs in this Court and the High Court from the respondent-State.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate/Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The British India Steam Navigation Co., Ltd. and others .. *Appellants**

v.

Jasjit Singh, Additional Collector of Customs,

Calcutta and others

Respondents.

Sea Customs Act (VIII of 1878), section 52-A—Vires—Foreign Companies on whom penalties have been imposed under Section 167 (12-A) for contravention of provisions of section 52-A—If can claim the fundamental rights guaranteed under Article 19 (1) (f) of the Constitution of India—Shipping Corporation of India—Cannot claim to be a citizen entitled to fundamental rights.

Foreign Companies whose vessels have contravened section 52-A of the Sea Customs Act and in respect of which penalties have been imposed under section 167 (12-A) read with section 183 are not entitled to claim the fundamental rights guaranteed under Article 19 (1) (f) of the Constitution of India.

1. (1952) 2 M.L.J. 614 : A.I.R. 1953 Mad. 116.

3. A.I.R. 1963 Mys. 141.

2. A.I.R. 1960 All. 62.

* C.A. No. 803 of 1962, and C.A. No. 374 of 1961, C.A. No. 299 of 1963, C.A. No. 312 of 1963 and Petitions Nos. 121 of 1959 and 2 to 4 of 1963, 3rd February, 1964.

The Shipping Corporation of India Ltd, cannot claim to be a citizen of India and as such not entitled to rely upon Article 19 (1) in support of the case that section 52 A of the Sea Customs Act is ultra vires

Appeal by Special Leave from Order No 831 of 1961, dated 27th May 1961, of the Government of India, Ministry of Finance (Department of Revenue and/or from the Order dated 7th January, 1960 of the Central Board of Revenue Customs Appeal No 443 of 1959 Appeal by Special Leave from Order No 2 dated 1st June, 1959 of the Additional Collector of Customs, Calcutta Appeal by Special Leave from the Judgment and Order dated 7th July, 1961 of Calcutta High Court in Appeal from Original Order No 28 of 1959 Appeal by Special Leave from Order No 112 dated 1st October, 1960 of the Collector of Customs Calcutta And Petition (under Article 32 of the Constitution India for the enforcement of fundamental rights)

Sachin Choudhury and *B Sen*, Senior Advocates, (*S N Mukherjee*, Advocate, with them), for Appellant (In C A No 803 of 1962) and Petitioner (In Petition No 2 to 4 of 1963)

B Sen Senior Advocate, (*S N Mukherjee* Advocate with him), for Appellant (In C A No 374 of 1961, 299 of 1963 and 312 of 1963) and the Petitioner (Petition No 121 of 1959)

S V Gupte, Additional Solicitor General of India (*R Ganapathy Iyer* and *R Dhebar*, Advocates, with him), for Respondents (In C A No 803 of 1962 and Petitions (No 2 to 4 of 1963)

S V Gupte, Additional Solicitor General of India and *A S Bindra* Senior Advocate, (*R H Dhebar*, Advocate, with them), for Respondents (In C A Nos 374 of 1961, 299 of 1963, 312 of 1963 and Petition No 121 of 1959)

The Judgment of the Court was delivered by

Gajendragadkar, C J—Along with Civil Appeal No 770 of 1962¹ in which we have pronounced our judgment to-day, four other civil appeals and four writ petitions, were also placed for hearing, because they raise a common question about the construction of section 52 A of the Sea Customs Act, and we propose to deal with them by this common judgment

We will first take Civil Appeal No 803 of 1962 which has been filed by Special Leave by the *British India Steam Navigation Co., Ltd*, against the decision of the Central Board of Revenue pronounced on 7th January, 1960, as well as the decision of the Central Government pronounced on 27th May, 1961. The offending ship is '*Santhia*' and the fine imposed is Rs 42,500. So far as this appeal is concerned, for the reasons given by us in dismissing Civil Appeal No 770 of 1962 it also fails and must be dismissed with costs

Civil Appeal No 374 of 1961 and Writ Petition No 121 of 1959 have been filed by *Everett Orient Line Incorporated*. The offending vessel in this case is '*Reverett*'. On 5th September, 1957, the Collector of Customs had imposed a fine of Rs 4 lakhs in lieu of confiscation of this vessel under section 167 (12 A) read with section 183 of the Sea Customs Act. This order was challenged by the appellant by preferring a writ petition before the Calcutta High Court under Article 226 of the Constitution. *D N Sinha J*, who heard this writ petition held that imposing a fine of Rs 4 lakhs, the Collector of Customs had misconstrued the scope of his jurisdiction and powers and so, he set aside the said order and sent it back to him to reconsider the question of fine in accordance with law. This order was pronounced on 11th September, 1958. As a result of the order of remand thus passed by the High Court, the matter was considered by the Collector of Customs again and the fine of Rs 4 lakhs initially imposed by him has been reduced to Rs 2 lakhs. It is against this order that the appellant has come to this Court by C.A No 374 of 1961 and has also filed W.P No 121 of 1959

¹ *Indo-China Steam Navigation Co., Ltd v Jaiya Singh*, A I R. 1964 S.C. 1140

C.A. No. 299 of 1963 has been preferred by Special Leave by the Everett Orient Line Incorporated. The offending ship is 'Norveverett.' The Collector of Customs has imposed a fine of Rs. 1 lakh. The said order was challenged by the appellant by a writ petition before the Calcutta High Court. The said petition was dismissed by Sinha, J., on 11th September, 1958 and an appeal under the Letters Patent preferred by the appellant was also dismissed on 7th July, 1961. It is against this order of the Letters Patent Bench that the appellant has come to this Court in the present appeal.

Civil Appeal No. 312 of 1963 has been preferred by the Everett Orient Line Incorporated against the order of the Collector of Customs imposing a fine of Rs. 26 lakhs in lieu of confiscation of the vessel 'Rutheverett'. This order was passed on 1st October, 1960. The appellant has come to this Court by Special Leave directly against this order.

The remaining three Writ Petitions Nos. 2-4 of 1963 have been filed by the Shipping Corporation of India Ltd., the offending ships being 'State of Bihar', 'State of Uttar Pradesh', and 'State of Bihar' respectively. These Writ Petitions have been filed against the orders of the Collector of Customs. In the first case, the order was passed on 25th July, 1962, imposing a fine of Rs. 50,000; in the second the order was passed on 4th September, 1962, imposing a fine of Rs. 10,000; and in the last, the order was passed on 16th August, 1962, imposing a fine of Rs. 25,000.

We have heard all these matters together because they raise the same question which was raised for our decision by the appellant in C.A. No. 770 of 1962.¹ If these matters had not been placed together for hearing along with the said civil appeal, we would not have entertained them, except C.A. No. 299 of 1963. This latter appeal has been brought against the decision of the Calcutta High Court and the only point which could have been argued by the appellant would be one of jurisdiction, since the appellant had moved the said High Court under Article 226, and that too against the order of the Collector of Customs. But in regard to the other matters, the parties have come to this Court directly against the orders of the Collector of Customs and this Court generally does not entertain appeals against the orders passed by a Tribunal unless the alternative remedies provided by the relevant Act by way of appeals or revisions have been pursued by the aggrieved party. We have already seen that against the order of confiscation and fine passed by the Collector of Customs, an appeal is competent, and against the decision of the appellate authority, a revision also lies. That being so, we would have hesitated to entertain these appeals if each one of them had come separately for hearing before us. In fact, the question as to whether the writ jurisdiction of the High Court could be successfully invoked by a party immediately after an order is passed against him by the Collector of Customs under section 167 (12-A) and section 183, does not appear to have been argued before the Calcutta High Court when it entertained the writ proceedings from which Appeal No. 299 of 1963 has been brought to this Court. As was observed by this Court in *A. V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj, Wadhvani and another*², the rule that a party who applies for the issue of a high prerogative writ should, before he approaches the Court, have exhausted, other remedies open to him under the law, though not one which bars the jurisdiction of the Court to entertain the petition or to deal with it, but is a rule which Courts have laid down for the exercise of their discretion. That is one aspect which has to be borne in mind in dealing with C.A. No. 299 of 1963, and the other writ petitions in this group.

If an appeal is entertained against an order passed by the Collector of Customs and our jurisdiction is allowed to be invoked under Article 136, it would lead to this anomalous result that questions of fact determined by the Collector of Customs may have to be re-examined by us as a Court of facts and an argument impeaching the validity or propriety of the order of fine may also have to be considered, and

1. *Indo-China Steam Navigation Co., Ltd. v. Jasjit Singh*, A.I.R. 1964 S.C. 1140. (S.C.) 83 : (1962) 1 An.W.R. (S.C.) 83 : (1962) 1 S.C.J. 170.

2. (1962) 1 S.C.R. 753 : (1962) 1 M.L.J.

these precisely are the matters which the Legislature has left to the determination of the appellate and the revisional authorities as prescribed by sections 190 and 191 of the Sea Customs Act. Besides, the High Court should be slow in encouraging parties to circumvent the special provisions made providing for appeals and revisions in respect of orders which they seek to challenge by writ petition under Article 226. In the present case, however, these writ petitions were presumably admitted because they raised a question of some importance which had already been raised by some appeals properly brought before this Court under Article 136, and so, we have allowed the counsel to argue these writ petitions on the question of construction alone.

Besides, it appears that these writ petitions and C.A. No. 299 of 1963 purport to raise a question about the validity of section 52 A of the Sea Customs Act and that may have weighed in favour of admitting the said matters, but as we have held in Civil Appeal No. 770 of 1962¹, the foreign companies whose vessels have contravened section 52 A and in respect of which penalties have been imposed under section 167 (12-A) read with section 183, are not entitled to claim the fundamental right guaranteed under Article 19 (1) (f) of the Constitution, and so, that plea fails.

In regard to the Shipping Corporation of India, Ltd., which has filed the three Writ Petitions Nos. 2-4 of 1963, the said Corporation is in no better position. As a result of the decision of this Court in *The State Trading Corporation of India, Ltd. v. The Commercial Tax Officer and others*², the Shipping Corporation of India, Ltd. cannot claim to be a citizen of India, and as such, is not entitled to rely upon Article 19 (1) in support of its case that section 52 A is *ultra vires*.

The result is, all the Civil Appeals and the Writ Petitions included in this group fail and are dismissed. Since these matters were heard along with Civil Appeal No. 770 of 1962¹, there would be no order as to costs in respect of them.

K S

Appeals and Petitions dismissed

THE SUPREME COURT OF INDIA

PRESENT —A K SARKAR, M Hidayatullah AND J C SHAH, JJ

Commissioner of Income-tax, Bihar

*Appellant**

Dalmia Investment Company, Ltd

Respondent

Income tax—Bonus shares—Valuation of cost—Sale by assessee of ordinary and bonus shares—Computation of profit—Principles

The assessee company was holding shares as investor and was also dealing in shares. In 1913 it was holding 31,909 ordinary shares in a company and in that year the company issued bonus shares one bonus share for one ordinary share, of the face value of Rs. 10 each. The assessee was holding on 1st January, 1918, 110,747 shares as stock in trade valued in the books at Rs. 15,57,902. The bonus shares were valued at their face value. The assessee company sold all the shares on 29th January, 1918 for Rs. 15,50,458. For the assessment year 1919-20 the assessee claimed a loss on the sale of the shares at Rs. 7,444. The Income-tax Officer found that the market value of the shares when the bonus shares were issued was Rs. 18 per share, that the sale of shares took place at Rs. 14 per share and there was a profit of Rs. 7.50 per bonus share and the total profit was taxable as capital gains. The Appellate Assistant Commissioner held that the bonus shares cost nothing to the assessee and that omitting the sum attributed in the books to the bonus shares the assessee was taxable on the surplus of Rs. 3,11,616 as trading profit and not as capital gains. The Tribunal confirmed the order of the Appellate Commissioner. The High Court on Reference held that the payment for the shares must be found in the bonus which was declared from the undistributed profits and the face value of the bonus shares represented the detriment to the assessee company in respect of the undistributed reserves and answered the Reference in favour of the assessee. The Department appealed, by Special Leave, to the Supreme Court.

Held (Per Hidayatullah for himself and Shah, J.)—The four possible methods for determining the cost of bonus shares are: (i) cost to be taken as equivalent to the face value of the bonus shares; (ii) to be taken as nil; (iii) to take the cost of the original shares and to spread it over the original shares and the bonus shares taken collectively and; (iv) to find out the fall in the price of the original shares on the stock exchange and to attribute the fall to the issue of the bonus shares.

¹ *Indo-China Steam Navigation Co. Ltd. v. Jay Singh* A.I.R. 1964 S.C. 1140

² (1963) 2 S.C.J. 605 (1963) 2 Com.L.J. 234 A.I.R. 1963 S.C. 1811

* C.A. No. 780 of 1967

13th March, 1964

By the issue of bonus shares, in point of fact, what the shareholder gets is not cash, but property from which income in the shape of money may be derived in future. If the shareholder sells his bonus shares, the shareholder parts with the right to participate in the capital of the company, and the cash he receives is not dividend but the price of the right. The bonus shares when sold may fetch more or less than the face value and this shows that the share certificate is not a voucher to receive the amount on its face.

The Income-tax Act defines 'dividend' and also extends it in some directions but not so as to make the issue of bonus shares a release of reserves as profits, so that they could be included in the term. The face value of the shares cannot therefore be taken to be dividend by reason of anything in the definition.

The cost of bonus shares cannot be equivalent to their face value.

The bonus shares cannot be said to have cost nothing to the shareholder because on the issue of the bonus shares, there is an instant loss to him in the value of his original holding. The earning capacity of the capital remains the same, even after the reserve is converted into bonus shares. By the issue of the bonus shares there is a corresponding fall in the dividends actual or expected and the market price moves accordingly. The method of calculation which places the value of bonus shares at nil cannot be correct.

The bonus share is to be valued by spreading the cost of the old shares over the old shares and the new issue of bonus shares taken together, if the shares rank *pari passu*. If the shares do not rank *pari passu*, the price may have to be adjusted either in the proportion of the face value they bear (if there is no other circumstance differentiating them) or on equitable considerations based on the market price before and after the issue.

Per Sarkar, J.—Where it cannot be shown what was paid for the acquisition of a trading asset, by a trader, it has, for tax purposes, to be deemed to have been acquired, at the market value of the date when it was acquired. The bonus shares, in the instant case, must be deemed to have been acquired at the market value of the date of their issue.

The two other methods suggested for valuing the cost of acquiring the bonus shares are, method of averaging, and the method of finding out the fall in the price of the original shares on the issue of the bonus shares and attributing to the latter shares the (bonus shares) fall and to so value them. The object is to find out what the bonus shares actually cost the assessee, but this would be an impossible task for they actually cost the assessee nothing. It never paid anything for them. Since no amount was actually paid for the bonus shares by the assessee, the two methods have to be rejected.

Appeal by Special Leave from the Judgment and Decree dated 28th November, 1960 of the Patna High Court, in Miscellaneous Judicial Case No. 724 of 1958.

K. N. Rajagopal Sastri, Senior Advocate, (R. N. Sachthey, Advocate, with him) for Appellant.

S. K. Kapur, Senior Advocate, (B. N. Kirpal, Advocate, with him), for Respondent.

The Court delivered the following Judgments :

Sarkar, J.—This matter has come before us on a case stated by the Income-tax Appellate Tribunal. The question is how to determine the costs of acquisition of bonus shares for ascertaining the profits made on a sale of them. The assessment year concerned is 1949-50 for which the accounting year is the calendar year 1948.

The assessee held shares by way of investment and also as stock-in-trade of his business as a share dealer. We are concerned in this case only with its holdings of ordinary shares in Rohtas Industries Ltd. In 1944 the assessee acquired 31,909 of these shares at a cost of Rs. 5,84,283 and was holding them in January, 1945. In that month the Rohtas Industries Ltd. distributed bonus shares at the rate of one ordinary bonus share for each original share, and so the assessee got 31,909 bonus shares. Between that time and 31st December, 1947, the assessee sold 14,650 of the original shares with the result that on 1st January, 1948 it held the following shares :—(a) 17,259 original shares acquired in 1944, (b) 31,909 bonus shares issued in January 1945, (c) 53,079 newly issued shares acquired in the year 1945 after the issue of the bonus shares and (d) 2,500 further shares acquired in 1947. The total holding of the assessee on 1st January, 1948 thus came to 110,747 shares which in its books had been valued at Rs. 15,57,902. In arriving at this figure the assessee had valued the bonus shares at the face value of Rs. 10 each and the other shares at actual cost. On 29th January, 1948, the assessee sold all these shares for the total sum of Rs. 15,50,458, that is, at Rs. 14 per share and in its return for the year 1949-50 claimed a loss of Rs. 7,444 on the sale. It is this return which has led to this appeal.

The Income-tax Officer held that the assessee was not entitled to charge as the cost of acquisition of the bonus shares a sum equivalent to their face value, for nothing

had in fact been paid and he computed their cost at Rs 680 per share. He arrived at this price by the following method, which has been called as the method of averaging

$$\begin{array}{l} 584283 \times \text{Face value of bonus shares} \\ 319090 \times 1/31909 \end{array}$$

In adopting this procedure the Income tax Officer purported to follow the decision of the Bombay High Court in *Commissioner of Income tax v Maneklal Chumilal & Sons Ltd*¹. The Bombay High Court later followed this case in *Emerald & Co Ltd v Commissioner of Income tax, Bombay City, Bombay*². On that basis he held that the assessee had made a profit of Rs 2,39,317 by way of capital gains and levied tax on it accordingly. On appeal, the Appellate Assistant Commissioner held that these shares were not investment shares, but formed the assessee's stock in trade on which it was liable to pay Income tax and not capital gains tax. He also held that the assessee having adopted the method of valuing the stocks at cost and no price having actually been paid for the bonus shares, it must be held that there was an inflation in the opening stock by Rs 3,19,090. This figure, it may be observed, represented the cost of the bonus shares at their face value. In his opinion the bonus shares had to be valued at nil. The Appellate Commissioner's conclusion was that the assessee was liable to be taxed on a trading profit of Rs 3,11,646 in respect of the sale of shares. This view was confirmed on a further appeal to the Appellate Tribunal. It is however, not clear whether the Tribunal held that there had been a trading profit or capital gains. This matter does not seem to have been raised at any stage after the Appellate Commissioner's order and is not material to the real question that has to be decided.

After the Tribunal's judgment, the assessee got an order from the High Court directing the Tribunal to refer the following question to it

* Whether on the facts and circumstances of the case the profit computed at Rs 3,11,646 on the sale of shares in Rohtas Industries Ltd, was in accordance with law ?"

The answer to this question admittedly depends on the cost of acquisition, if any, to be properly attributed to the bonus shares. If the Appellate Commissioner's method of valuing them at nil was wrong the question had to be answered in the negative. The High Court, following the judgment of Lord Sumner in *Swan Brewery Company Limited v The King*³, held that the real cost of the bonus shares to the assessee was the face value of the shares, and answered the question in the negative.

The observations of Lord Sumner which he later expressed more fully in *Commissioner of Inland Revenue v Blott*⁴, no doubt, lend support to the High Court's view. I shall consider the view expressed by Lord Sumner later. Now, I wish to notice another case on which the High Court also relied, and that was *Osborne (H M Inspector of Taxes) v Steel Barrel Co., Ltd*⁵. I do not think that the observations of Lord Greene, M R. in this case, to which the High Court referred, are of any assistance. All that was there said was that when fully-paid shares were properly issued for a consideration other than cash, the consideration must be at the least equal in value to the par value of the shares and must be based on an honest estimate by the directors of the value of the assets acquired. In that case, fully paid shares had been issued in lieu of stocks and the question was as to how the stocks were to be valued. That case had nothing to do with the issue of bonus shares or the ascertainment of the cost of their acquisition.

As I have said earlier, Lord Sumner's observation in *Blott's case*⁴, certainly supports the view taken by the High Court, but in that case Lord Sumner was in a minority. The other learned Judges, excepting Lord Dunedin, who took a somewhat different view (to which reference is not necessary) because it has not been relied upon, held that when the articles of a company authorise the issue of bonus shares and the transfer of a sufficient amount out of the accumulated profits in its

1 IT Ref No 16 of 1948 (unreported)

2 (1956) 29 ITR 814 AIR 1956 Bom.

3 LR (1914) A.C. 231

4 LR (1921) 2 A.C. 171

5 (1942) 24 T.C. 293.

hands representing their face value to the share capital account, what happens when the articles are acted upon is a capitalisation of the profits and the bonus shares issued are not in the hands of the shareholder income liable to tax. In *Blott's case*¹, the articles gave the power which had been acted upon. Lord Sumner, on the other hand, held that since a company could not issue shares for nothing nor pay for them out of its profits, it must be held that what happened in such a case was as if the company had issued cash dividend to the shareholder and had set it off against the liability of the shareholder to pay for the bonus share issued to him.

I think the preferable view is that taken by the majority of the Judges. When the articles permit the issue of bonus shares and the transfer of undivided profits direct to the share capital account, it cannot be said that a cash dividend must be deemed to have been declared which could be set-off against the liability to pay for the shares. This is not what was done in fact. What in fact was done, and legally done, was to transfer the profits to the share capital account by a resolution passed by the majority of the shareholders, so that the shareholders never acquired any right to any part of it. The view taken by the majority has since been followed unanimously and even if it was open to doubt, for myself at this distance of time, I would not be prepared to depart from it : *Commissioners of Inland Revenue v. Fisher's Executors*² and *Commissioner of Income-tax, Bengal v. Mercantile Bank of India Limited*.³ It is of some significance to observe that the latter is a case from India.

In the present case, the record does not contain any reference to the resolutions resulting in the issue of the bonus shares nor to the provisions of the articles, but the case has proceeded before us on the basis that the bonus shares had been legally issued under powers contained in the articles and the profits had been equally legally transferred to the share capital account without the shareholders having acquired any right in them. Following the majority opinion in *Blott's case*¹. I think I must hold that the High Court was in error in the view it took in the present case. There is no foundation for proceeding on the basis as if the bonus shares had been acquired by the assessee at their face value. Its profits cannot be computed on that basis.

Two other methods of ascertaining the cost of acquisition of the bonus shares for computing the profits made on their sale have been suggested. One of them is the method of averaging which is the method adopted by the Bombay High Court in the cases earlier mentioned. The other is the method of finding out the fall in the price of the original shares on the issue of the bonus shares and attributing to the latter shares that fall and to value them thereby. The object of these methods seems to me to find out that what the bonus shares actually cost the assessee. But this would be an impossible task for they actually cost the assessee nothing ; it never paid anything for them. There would be more reason for saying that it paid the face value of the bonus shares because the profits of the company of a similar amount which might otherwise have come to it had been directly appropriated to the share capital account on the issue of the bonus shares. But this method I have rejected already and, for the reason that no amount was actually paid for the bonus shares by the assessee. For the same reason, the two suggested methods for ascertaining the actual cost of these shares have also to be rejected. If, however, it were to be said these methods were for finding out the market value of the bonus shares the importance of which value for the present purpose will soon be seen I would say that the only way to find out the market value is from the market itself.

How then is the cost of the bonus shares to be determined ? We start with this, that nothing in fact was paid for them. But if the cost of acquisition is nil, the whole of the sale proceeds of the shares would be taxable profits. In *Commissioner of Income-tax v. Bai Shrinbai K. Kooka*⁴, this Court approved of the Bombay High Court's view that :

" obviously, the whole of the sale proceeds or receipts could not be treated as profits and made liable to tax, for that would make no sense ".

1. L.R. (1921) 2 A.C. 171.

2. L.R. 1926 A.C. 395.

3. (1936) L.R. 63 I.A. 457; I.L.R. (1937) 1 Cal.

117: 80 M.L.J. 823; L.R. (1936) A.C. 478.

4. (1963) 1 S.C.J. 604 ; (1962) (Supp.) 3

S.C.R. 391 at 397.

So, the profits cannot be ascertained on the basis that the bonus shares had been acquired for nothing. The view taken by the Appellate Commissioner and the Tribunal cannot be supported.

It seems to me that the cost price of the bonus shares has to be decided according to the principle laid down in *Bai Shirinbai Kooka's case*¹. The assessee in that case had purchased shares many years ago by way of investment at a comparatively lower price. She started trading with them from 1st April, 1945. The question was how the profits on the sale of these shares were to be ascertained. The sale price was known, but what was the cost price? The High Court said that in order to arrive at real profits one must consider the accounts of the business on commercial principles and construe profits in their normal and natural sense, a sense which no commercial man would misunderstand. The High Court's conclusion was this: When the assessee purchased the shares at a lesser price—that is what they cost her, and not the business—but so far as the business was concerned, the shares cost the business nothing more or less than their market value on 1st April 1945. This date, it will be remembered, was the date when the business was started. These observations were fully approved by this Court.

*Bai Shirinbai Kooka's case*¹, therefore is authority for the proposition that where it cannot be shown what was paid for the acquisition of a trading asset by a trader, it has, for tax purposes, to be deemed to have been acquired at the market value of the date when it was acquired. I think on the authority of this case, the bonus shares must, in the present case, be deemed to have been acquired at the market value of the date of their issue.

I would, therefore, answer the question framed in the negative¹.

Hidayatullah, J. (for himself and *J. C. Shah, J.*)—This appeal by the Commissioner of Income tax, Bombay, raises the important question how bonus shares must be valued by an assessee who carries on business in shares. The assessee here is Dalmia Investment Co., Ltd. (now Shri Rishab Investment Co., Ltd.), which is a public limited company and the bonus shares were issued in the calendar year 1945 by Rohtas Industries Ltd., in the proportion of one bonus share for one ordinary share already held by the shareholders. In this way, the assessee company received 31,909 bonus shares of the face value of Rs. 10 per share, which shows that its previous holding was 31,909 ordinary shares. The existing ordinary shares were purchased by the assessee company for Rs. 5,85,283. We now come to the assessment year 1949-50 which corresponded to the accounting period of the assessee company—the calendar year 1948. The assessee company was holding shares as investment and was also dealing in shares. The shares in the trading account, being the stock-in-trade, were valued at the beginning of the year and also at the end of the year and the book value was based on cost. Between 31st December, 1945 and 1st January, 1948, the assessee company sold some shares of Rohtas Industries Ltd., and bought others. Its holding on the first day of January, 1948 was 110,747 shares which were valued in its books at Rs. 15,57,902. The assessee company sold these shares on 29th January, 1948 to Dalmia Cement and Paper Marketing Company Limited for Rs. 15,50,458. This date, it may be pointed out, fell within the period in which capital gains were taxable. The assessee company returned a loss of Rs. 7,444 on this sale. In its books it had valued these shares as follows:

| Existing shares | Book value | |
|--|---------------------|--------------------------------------|
| (1) 17,259 (out of 31,909 original shares) | 3 10 951 00 nP | Proportionate cost from Rs. 5,84,283 |
| (2) 31,909 Bonus shares | 3,19 090 00 nP | at face value of Rs. 10 per share |
| (3) 59 079 New Issue shares | 8 88,561 00 nP | at cost |
| (4) 2,500 New purchase shares | 39,300 00 nP | at cost |
| Total 110,747 shares | Rs. 15,57,902 00 nP | |

The amount of Rs. 3,19,090 which represented the cost of the bonus shares in the above account was debited to the investment account and an identical amount was credited to a capital reserve account. The loss which was returned was the difference between Rs. 15,57,902 claimed to be the cost price of 110,747 shares and their sale price of Rs. 15,50,458.

The return was not accepted by the Income-tax Officer, Special Investigation Circle, Patna. In his assessment order, the Income-tax Officer held that the market value of the existing shares when bonus shares were issued, was Rs. 18 per share, and the value of the shares was Rs. 5,74,362 (31,909) (Rs. 18). He held that the sale of the shares took place at Rs. 14 per share. To this data he purported to apply a decision of the High Court of Bombay in *Commissioner of Income-tax v. Maneklal Chummilal & Sons*¹, and held that there was profit of Rs. 7-8-0 per bonus share and the total profit was Rs. 2,39,317 which he held was capital gains. He brought Rs. 2,39,317 to tax as capital gains.

Before the Appellate Assistant Commissioner, Patna reliance was placed upon the decision of the Bombay High Court in *Emerald & Co., Ltd. v. Commissioner of Income-tax, Bombay City*² and it was argued that by applying the principle laid down in that case, the average cost was Rs. 7-10-0 per share and total profit Rs. 1,49,355. The Appellate Assistant Commissioner did not accept the above calculation. According to the Appellate Assistant Commissioner, the bonus shares had cost nothing to the assessee company. He omitted Rs. 3,19,090 from the book valuation and held that the actual cost of 110,747 shares was Rs. 12,38,812 and that the assessee company instead of suffering a loss of Rs. 7,444 on the sale of the shares had actually made a profit of Rs. 3,11,646. He issued a notice to the assessee company and enhanced the assessment.

On further appeal to the Tribunal, the assessee company submitted again on the strength of the ruling of the Bombay High Court in *Emerald & Co., Ltd. v. Commissioner of Income-tax, Bombay City*², that the actual profit was Rs. 1,57,326. This was done by spreading the cost of the 31,909 ordinary shares over those shares and bonus shares taken together and adding to half the cost attributable to the old ordinary shares the cost of new purchases in the same year and finding out the average cost of shares other than bonus shares.

The Tribunal did not accept this calculation. According to the Tribunal, it was not possible to put a valuation upon shares for which nothing was paid. The Tribunal held that the old shares and bonus shares could not be "clubbed together" and the decision of the Appellate Assistant Commissioner was right. The Tribunal, however, stated a case under section 66 (1) of the Income-tax Act at the instance of the assessee company suggesting the question for the opinion of the High Court :

"Whether on the facts and circumstances of the case, the profit computed at Rs. 3,11,646 on the sale of shares in Rohtas Industries Ltd., was in accordance with law ?"

The reference was heard by V. Ramaswamy, C. J., and Kanhaiya Singh, J. They held that the Income-tax authorities were wrong in holding that profit should be computed at Rs. 3,11,646 or at any other amount. According to them, there was no profit on the sale of 31,909 shares and they answered the question in favour of the assessee. Before the High Court it was contended by the assessee company that the bonus shares must be valued at their face value of Rs. 10 per share and the Department contended that they should be valued at nil. It appears that the other methods of calculation of the cost price of bonus shares were abandoned at that stage. Ramaswami, C. J., and Kanhaiya Singh, J., held that the issue of bonus shares was nothing but a capitalisation of the company's reserve account or the profits and the bonus shares could not be considered to be issued free. According to them, the payment for the shares must be found in the bonus which was declared from the undistributed profits and the face value of the bonus shares represented the detriment to the assessee company in respect of the undistributed reserves. The present appeal was brought against the decision of the High Court by Special Leave granted by this Court.

It will be seen from the above that there are four possible methods for determining the cost of bonus shares. The *first* method is to take the cost as the equivalent of the *face* value of the bonus shares. This method was followed by the assessee company in making entries in its books. The *second* method, adopted by the Department is that as the shareholder pays nothing in cash for the shares, the cost should be taken at nil. The *third* method is to take the cost of the original shares and to spread it over the original shares and bonus shares taken collectively. The *fourth* method is to find out the fall in the price of the original shares on the stock exchange and to attribute this to the bonus shares. Before us the assessee company presented for our acceptance the first method and the Department the third method. We shall now consider which is the proper way to value the bonus shares.

It is convenient to begin with the contention that the cost of the bonus shares must be taken to be their face value. The argument requires close attention, because support for it is sought in certain pronouncements of Lord Sumner to which reference will be made presently. Mr Kapur contends that a company cannot ordinarily issue shares at a discount and argues that *a fortiori* it cannot issue shares for nothing. He submits, therefore, that the issue of bonus shares involves a twofold operation—the creation of new shares and the declaration of a dividend or bonus, which dividend or bonus must be deemed to be paid to the shareholder and to be returned by him to acquire the new shares. Since the amount credited in the books of the company as contribution of capital by the shareholder is the face value of the bonus shares, he contends that the cost to the shareholder is equal to the face value of the bonus shares. He relies upon the decision of the Privy Council in *Swan Brewery Company, Ltd v. Rex*¹. In that case, Lord Sumner observed:

True that in a sense it was all one transaction but that is an ambiguous expression. In business as in contemplation of law there were two transactions: the creation and issue of new shares on the company's part and on the allottee's part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of £1,014,505 in right of the old shares and created instead a right of general participation in the company's profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them.

Lord Sumner adhered to his view later in the House of Lords in *Commissioner of Inland Revenue v. John Blott*,² but Lord Dunedin and he were in minority, and this view was not accepted by the majority. In view of this conflict, it is necessary to state what really happens when a company issues bonus shares.

A limited liability company, must state in its memorandum of association the amount of capital with which the company desires to do business and the number of shares into which that capital is to be divided. The company need not issue all its capital at the same time. It may issue only a part of its capital initially and issue more of the unissued capital on a later date. After the company does business and profits result, it may distribute the profits or keep them in reserve. When it does the latter, it does not keep the money in its coffers; the money is used in the business and really represents an increase in the capital employed. When the reserves increase to a considerable extent, the issued capital of the company ceases to bear a true relation to the capital employed. The company may then decide to increase its issued capital and declare a bonus and issue to the shareholders in lieu of bonus, certificates entitling them to an additional share in the increased capital. As a matter of accounting the original shares in a winding up before the increase of issued capital would have yielded to the shareholder the same return as the old shares and the new shares taken together. What was previously owned by the shareholder by virtue of the original certificates is, after the issue of bonus shares, held by them on the basis of more certificates. In point of fact, however, what the shareholder gets is not cash, but property from which income in the shape of money may be derived in future. In this sense there is no payment to him, but an increase of issued capital and the right of the shareholder to it is evidenced not by the original number of certificates held by him, but by more certificates. There is thus no payment of dividend. A dividend in the strict sense means a share in the profits, and a share in the profits

can only be said to be paid to the shareholder, when a part of the profits is released to him in cash, and the company pays that amount and the shareholder takes it away. The conversion of the reserves into capital does not involve the release of the profits to the shareholder, the money remains where it was, that is to say, employed in the business. Thereafter, the company employs that money not as reserves of profits, but as its proper capital issued to, and contributed by, the shareholder. If the shareholder were to sell his bonus shares, as shareholders often do, the shareholder parts with the right to participation in the capital of the company, and the cash he receives is not dividend but the price of that right. The bonus share when sold may fetch more or may fetch less than the face value, and this shows that the certificate is not a voucher to receive the amount mentioned on its face. To regard the certificate as cash or as representing cash paid by the shareholder is to overlook the internal process by which that certificate comes into being.

We may now see what was decided in the *Swan Brewery's case*¹. In that case, the company had not distributed all its profits in the past. As a result, it had a vast reserve fund. The company increased its capital and, from the reserve fund, issued shares *pro rata*. These shares, it was held by Lord Sumner, were dividend. It was claimed in that case that there was no dividend and no distribution of dividend, because nothing had been distributed and nothing given. Where formerly there was one share, after the declaration of bonus there were two, but the right of participation was the same. This argument was not accepted and the face value of the shares was taken to be dividend. Section 2 of the Act of Western Australia, however, defined dividend to include "every profit, advantage or gain intended to be paid or credited to or distributed among the members of any company". It is obvious that it was impossible to hold that the bonus shares were outside the extended definition.

*Swan Brewery's case*¹, has been accepted as rightly decided on the special terms of the section, as indeed it was. In *Blott's case*², Rowlatt, J., observed that the bonus shares were included in the expression "advantage" occurring in the highly artificial definition of the word "dividend". In the Court of Appeal, Lord Sterndale, M. R. and Warrington and Scrutton, L. JJ., distinguished the case on the same ground. It was, however, pointed out by the Master of Rolls that in *Bouch v. Sproule*³, Lord Herschell had observed that in such a case, the company does not pay or intend to pay any sum as dividend, but intends to and does appropriate the undivided profits and deals with them as an increase of the capital stock in the concern.

*Blott's case*², then reached the House of Lords. It may be pointed out at this stage that it involved a question whether super-tax was payable on the amount represented by the face value of the bonus share. For purposes of assessment of super-tax which was (as it is in our country) a tax charged in respect of income of an individual the total of all income from all sources has to be taken into account and the tax was exigible if the total increased a certain sum. Such additional duty is really nothing but additional income-tax and is conveniently described as super-tax. Viscounts Haldane, Finlay and Cave held that an amount equal to the face value of the shares could not be regarded as received by the tax-payer and that there was no more than the capitalisation of the profits of the company in respect of which certificates were issued to the shareholders entitling them to participate in the amount of the reserve, but only as part of the capital. Lords Dunedin and Sumner, however, held that the word "capitalisation" was somewhat "hazy" and the issue of the shares involved a dual operation by which an amount was released to the shareholder but was retained by the company and applied in payment of those shares. In our opinion, and we say it respectfully, the better view is that of the majority, and our conclusions set out earlier accord substantially with it.

It follows that though profits are profits in the hands of the company, but when they are disposed of by converting them into capital instead of paying them over to the shareholders, no income can be said to accrue to the shareholder, because the new shares confer a title to a larger proportion of the surplus assets at a general dis-

1. L.R. (1914) A.C. 231.

2. L.R. (1921) 2 A.C. 171; 8 Tax Cases 101.

3. (1887) L.R. 12 A.C. 385.

tribution. The floating capital used in the company, which formerly consisted of subscribed capital and the reserves, now becomes the subscribed capital. The amount said to be payable to the shareholders as income goes merely to increase the capital of the company, and, in the hands of the shareholders, the certificates are property from which income will be derived. Lord Dunedin did not rely upon *Swan Brewery's case*¹. He held that as the company could not pay for another, the shareholder must be taken to have paid for the bonus shares himself and the payment was the amount which came from the accumulated profits as profits. Lord Sumner however stated that in *Swan Brewery's case*¹ he did not rely upon the extended definition of dividend in the Australian Statute, but upon the principle involved. He observed that as a matter of machinery, what was done was to keep back the money released to the shareholders for application towards payment for the increased capital.

Lord Sumner had already adhered to his view in an earlier case of the Privy Council, but *Swan Brewery's case*¹, and *Blott's case*², were considered by the Privy Council in *Commissioner of Income tax, Bengal v. Mercantile Bank of India, Ltd., and others*³. Lord Thankerton distinguished *Swan Brewery's case*¹, and followed *Blott's case*² though in *Nicholas v. Commissioner of Taxes of the State of Victoria*⁴, *Blott's case*² was distinguished on the ground that the definition in the Unemployment Relief Tax (Assessment) Act, 1933 also included within a person's assessable income "any dividend, interest, profit or bonus credited paid or distributed to him by the company from any profit derived in or from Victoria or elsewhere by it", and that bonus shares must be regarded as dividend under that definition.

The Indian Income tax Act defines "dividend" and also extends it in some directions but not so as to make the issue of bonus shares a release of reserves as profits, so that they could be included in the term. The face value of the shares cannot therefore, be taken to be dividend by reason of anything in the definition. The share certificate which is issued as bonus entitles the holder to a share in the assets of the company and to participate in future profits. As pointed out above, if sold, it may fetch either more or less. The market price is affected by many imponderables, one such being the yield or the expected yield. The detriment to the shareholder, if any, must therefore be calculated on some principle, but the method of computing the cost of bonus shares at their face value does not accord either with fact or business accountancy.

Can we then say that the bonus shares are a gift and are acquired for nothing? At first sight, it looks as if they are so, but the impact of the issue of bonus shares has to be seen to realise that there is an immediate detriment to the shareholder in respect of his original holding. The Income tax Officer, in this case, has shown that in 1945 when the price of shares became stable it was Rs. 9 per share, while the value of the shares before the issue of bonus shares was Rs. 18 per share. In other words, by the issue of bonus shares *pro rata*, which ranked *pari passu* with the existing shares, the market price was exactly halved, and divided between the old and the bonus shares. This will ordinarily be the case but not when the shares do not rank *pari passu* and we shall deal with that case separately. When the shares rank *pari passu*, the result may be stated by saying that what the shareholder held as a whole rupee coin is held by him, after the issue of bonus shares, in two 50 paise coins. The total value remains the same, but the evidence of that value is not in one certificate but in two. This was expressed forcefully by the Supreme Court of United States of America, quoting from an earlier case, in *Eisner v. Macomber*⁵, thus:

"A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. * * * The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones. * * * In short, the corporation is no poorer and the stockholder is no richer than they were before. * * * If the plaintiff gained any small

1 L.R. (1914) A.C. 231
2 L.R. (1921) 2 A.C. 171 8 Tax Cases 101
3 (1936) L.R. 63 I.A. 457 1 L.R. (1937) 1

Cal 180 71 M.L.J. 523 L.R. 1936 A.C. 473
4 L.R. 1940 A.C. 741
5 252 U.S. 189 64 L. Ed. 521

advantage by the change, it certainly was not an advantage of £417,450 the sum upon which he was taxed. * * * What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

* * * If a shareholder sells dividend stock, he necessarily disposes of a part of his capital interest, just as if he should sell a part of his old stock, either before or after the dividend. What he retains no longer entitles him to the same proportion of future dividends as before the sale. His part in the control of the company likewise is diminished."

*Swan Brewery's case*¹, it may be pointed out, was distinguished here also on the basis of the extended definition. It follows that the bonus shares cannot be said to have cost nothing to the shareholder because on the issue of the bonus shares, there is an instant loss to him in the value of his original holding. The earning capacity of the capital employed remains the same, even after the reserve is converted into bonus shares. By the issue of the bonus shares there is a corresponding fall in the dividends actual or expected and the market price moves accordingly. The method of calculation which places the value of bonus shares at *nil* cannot be correct.

This leaves for consideration the other two methods. Here we may point out that the new shares may rank *pari passu* with old shares or may be different. The method of cost accounting may have to be different in each case, but in essence and principle there is no difference. One possible method is to ascertain the exact fall in the market price of the shares already held and attribute that fall to the price of the bonus shares. This market price must be the middle price and not as represented by any unusual fluctuation. The other method is to take the amount spent by the shareholder in acquiring his original shares and to spread it over the old and new shares treating the new as accretions to the old and to treat the old cost price of the original shares as the cost price of the old shares and bonus shares taken together. This method is suggested by the Department in this case. Since the bonus shares in this case rank *pari passu* with the old shares there is no difficulty in spreading the original cost over the old and the new shares and the contention of the Department in this case is right. But this is not the end of the present discussion. This simple method may present difficulties when the shares do not rank *pari passu* or are of a different kind. In such cases, it may be necessary to compare the resultant price of the two kinds of shares in the market to arrive at a proper cost valuation. In other words, if the shares do not rank *pari passu*, assistance may have to be taken of other evidence to fix the cost price of the bonus shares. It may then be necessary to examine the result as reflected in the market to determine the equitable cost. In England, paragraph 10 of Schedule of Tax to the Finance Act 1962, provides for such matters and for valuing rights issue, but we are not concerned with these matters and need not express an opinion.

It remains to refer to three cases to which we have already referred in passing and on which some reliance was placed. In *The Commissioner of Income-tax (Central) Bombay v. M/s. Maneklal Chumnilal & Sons, Ltd, Bombay*², the assessee held certain ordinary shares of the face value of Rs. 100 in Ambica Mills, Ltd. and Arvind Mills, Ltd. These two companies then declared a bonus and issued preference shares in the proportion of two to one of the face value of Rs. 100 each. These preference shares were sold by the assessee, and, if the face value was taken as the cost, there was a small profit. The Department contended that the entire sale proceeds were liable to be taxed, because the assessee had paid nothing for the bonus shares and everything received by it was profit. The assessee's view was that the cost was equal to the face value of the shares. The High Court rejected both these contentions, and held that the cost of the shares previously held must be divided between those shares and the bonus shares in the same proportion as their face value, and the profit or loss should then be found out by comparing the cost price calculated on this basis with the sale price. In our opinion, there is difficulty in the High Court's decision. The preference shares and the ordinary shares could hardly be valued in the proportion of their face value. The ordinary shares and the preference shares do not rank *pari passu*.

The next case is *Emerald Co., Ltd. v. C.I.T., Bombay City*³. In that case, the assessee had, at the beginning of the year, 350 shares of which 50 shares were bonus

1. I.R. (1914) A.C. 231.

2. I.T. Reference No. 16 of 1948, unreported.

3. (1956) 29 I.T.R. 814 : A.I.R. 1956 Bom.

284.

shares and all were of the face value of Rs 250 each. The assessee sold 300 shares and claimed a loss of Rs 35,801 by valuing the bonus shares at face value. The Department arrived at a loss of Rs 27,766 by the method of averaging the cost following the earlier case of the Bombay High Court just referred to. The Tribunal suggested a third method. It ignored the 50 shares and the loss was calculated by considering the cost of 300 shares and their sale price. The loss worked out at Rs 27,748 but the Tribunal did not disturb the order of the Appellate Assistant Commissioner in view of the small difference. The High Court held that the method adopted by the Department was proper but this Court on appeal held that in that case the method adopted by the Tribunal was correct. This Court did not decide which of the four methods was the proper one to apply leaving that question open. The reason was that the assessee originally held 50 shares in 1950. In 1951 it received 50 bonus shares. It sold its original holding three days later and then purchased another 100 shares after two months. In the financial year 1950-51 (assessment year 1951-52) the Income tax Officer averaged the price of 150 shares and found a profit of Rs 1,060 on the sale of 50 shares instead of a loss of Rs 1,365 which was claimed. The assessee did not appeal. In the financial year 1951-52 (assessment year 1952-53) the assessee started with 150 shares (100 purchased and 50 bonus). It then purchased 200 shares in two lots and sold 300 shares leaving 50 shares. The assessee company claimed a loss of Rs 35,801. The Income tax Officer computed the loss at Rs 27,766 and the Tribunal computed the loss at Rs 27,748. The Tribunal however did not disturb the loss as computed by the Income tax Officer in view of the slender difference of Rs 18. The High Court's decision was reversed by this Court because the High Court ignored all intermediate transactions and averaged the 300 shares with the 50 bonus shares. The shares in respect of which the bonus shares were issued were already averaged with the bonus shares. This was not a case of bonus shares issued in the year of account. It involved purchase and sale of some of the shares. The average cost price of the original and bonus shares was already fixed in an earlier year by the Department and this fact should have been taken into account. No doubt Chagla C.J. observed that it was not known which of the several shares were sold in the year of account but in the Statement of the Case it was clearly stated that bonus shares were untouched.

The decision of this Court in *Emrald Company's case*¹ however, lends support to the view which we have expressed here. The bonus shares can be valued by spreading the cost of the old shares over the old shares and the new issue taken together if the shares rank *pari passu*. When they do not the price may have to be adjusted either in the proportion of the face value they bear (if there is no other circumstances differentiating them) or on equitable considerations based on the market price before and after the issue.

Applying the principles to the present case the cost of 31,909 shares namely, Rs 5,83,210 must be spread over those shares and the 31,909 bonus shares taken together. The cost price of the bonus shares therefore was Rs 2,92,141 because the bonus shares were to rank equal to the original shares. The account would thus stand as follows:

Shares in Robtas Industries Ltd.—

| | Rs |
|---|-----------|
| 1. Old issue of 17,259 shares brought forward from 1945 at (proportionate) cost | 1,58,035 |
| 2. Bonus shares 31,909 received in 1945 at (proportionate spread out) cost | 2,92,141 |
| 3. New issue 59,079 shares brought forward from 1945 | 8,88,561 |
| 4. New purchases 2,500 shares brought forward from 1947 | 39,300 |
| Total 110,747 shares | 13,78,037 |
| Sales of all the above shares in 1948 | 15,50,478 |
| Profit | 7,444 |
| Profit to be added to the income returned | 1,79,865 |

The answer to the question given by the High Court was therefore erroneous and the right answer would be that the profit computed at Rs. 3,11,646 was not in accordance with law. The appeal is therefore allowed with costs here and in the High Court.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate/Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

H.R.S. Murthy

.. *Appellant**

v.

The Collector of Chittoor and another

.. *Respondents.*

Madras District Boards Act (XIV of 1920), section 79—Land cess—Annual rental value—If to include payments for minerals and material won from the land leased—Sections 78 and 79—If impose tax on mineral rights to—If repealed by Mines and Minerals Development Act (LIII of 1948 and LXVII of 1957)—Land Cess due under section 78 if can be recovered as arrear of land revenue—Madras Revenue Recovery Act (II of 1864), section 52.

The expression “royalty” in section 79 (1) of the Madras District Boards Act includes the royalty payable (in addition to lease amount) under a mining lease on the materials or minerals won from the land. “Royalty” which follows the expression “lease amount” is something other than the return to the lessor or licensor for the use of the land surface and represents as it normally connotes the payment made for the materials or minerals won from the land. Such royalty can be included in the annual valuation for levy of land cess.

Sections 78 and 79 of the Madras District Boards Act have nothing to do and are not concerned with the development of mines and minerals or their regulation. There is no connection between the regulation and development of mines and minerals dealt with by Mines and Minerals (Regulation and Development) Acts (Central Acts LIII of 1948 and LXVII of 1957) and the levy and collection of land cess for which provision is made by sections 78 and 79 of the Madras District Boards Act.

The land cess is in truth a “tax on lands” within Entry 49 of the State List and not a tax on mineral rights falling within Entry 50 of the State List which could not be levied by the State after Central Acts LIII of 1948 and LXVII of 1957.

The land cess due under section 78 of the Madras District Boards Act can be recovered as an arrear of land revenue under section 52 of the Madras Revenue Recovery Act (II of 1864).

Appeals by Special Leave and by certificate from the Judgment and Order dated 25th March, 1960 of the Andhra Pradesh High Court in Writ Petitions Nos. 534 and 535 of 1958 and Petition under Article 32 of the Constitution of India for the enforcement of fundamental rights.

P. Ram Reddy, Advocate, for Appellant (In C.A. Nos. 316-A and 316-B of 1962) and Petitioner (In Petition No. 302 of 1960).

T.V.R. Tatachari and *B.R.G.K. Achar*, Advocates, for Respondents (In both the Appeals and the Petition).

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The two Civil Appeals and the petition under Article 32 of the Constitution which have been heard together raise a common point regarding the validity of notices of demand for the payment of land cess under the Madras District Boards Act (Madras Act XIV of 1920) which for shortness we shall call the Act, and the legality of the procedure for the recovery of the amount of the said cess. The impugned notices made a demand also for education cess but as this cess is merely a proportion of the land-cess, and as the validity of that demand stands or falls with that of the land cess, it is sufficient if we refer to and consider the challenge to the demand of land cess alone, as that will determine the validity of the entire sum demanded.

The appellant's father obtained a mining lease from the Government of Madras dated 15th September, 1953 under which he was permitted to work and win

iron ore in a tract of lands in a village in Chittoor district. The terms upon which the lessee was to work the mines are not very relevant but what is material is that under this instrument the lessee bound himself to pay a dead rent of Rs. 1140 2 per year if he used the leased land for the extraction of iron ore and a higher amount if used for other purposes. Besides he also bound himself to pay a royalty of 8 annas per ton of iron ore if the ore were used for extraction of iron and if the iron ore was used for any other purpose such as for sale in specie, at Re. 1 per ton. In addition, the lease also stipulated for the payment of surface rent at Rs. 1/3 3 per acre per annum in respect of the surface area occupied or used. The lessee worked the mines, extracted ore and marketed it.

To raise finances for carrying on the local administration in the District Boards, several taxes are leviable. Among them section 78 of the Act imposes a land cess on lands in the district in these terms:

78. The land-cess shall be levied on the annual rent value of all occupied lands on whatever tenure held and shall consist of a tax of two annas in the rupee of the annual rent value of all such lands in the district.

The "annual rent value" on the basis of which the land cess to be levied was to be computed in the manner laid down in section 79 and this section ran:

79. The annual rent value shall for the purposes of section 78 be calculated in the following manner:

(i) In the case of lands held direct from Government on ryotwari tenure or on lease or licence, the assessment lease amount royalty or other sum payable to Government for the lands together with any water rate which may be payable for their irrigation shall be taken to be the annual rent value.

(ii) In the case of inam lands or lands held wholly or partially free from assessment the full assessment which such lands would bear if they were not inam, together with any water rate which may be payable for their irrigation, shall be taken to be the annual rent value, and such full assessment and water rate shall be determined by the District Collector under the general orders of the Board of Revenue.

(iii) In the case of lands held on any other tenure the annual rent payable to the landholder, sub-landholder or any other intermediate landholder holding on an under tenure created, continued or recognized by a landholder, or sub-landholder, as the case may be by his tenants, together with any water rate which may be payable for their irrigation shall be taken to be the annual rent value, and where such lands are occupied by the owner himself or by any person holding the same from him free of rent or at a favourable rent the annual rent value shall be calculated according to the rates of rent usually paid by occupancy ryot for ryoti lands in the neighbourhood with similar advantages together with any water rate which may be payable for the irrigation of the lands so occupied.

(iv) In the case of lands the assessment of rent of which is paid in kind the annual rent value shall be calculated according to the rates of rent established or paid for neighbouring lands of a similar description and quality together with any water rate which may be payable for the irrigation of the lands first mentioned or if such method of calculation is, in the opinion of the Board of Revenue, impracticable in any particular case according to any method which the Board of Revenue may approve for that case.

Provided that where any landholder or sub-landholder has obtained under the provisions of sections 30 (iii) and 33 of the Madras Estates Land Act, 1908 a decree empowering him to increase his rent in consequence of any additional payment by way of water rate made by him to Government the annual rent value shall be the balance remaining after deducting such increase of rent up to the amount of the water rate from the sum ascertained as aforesaid.

When the State of Andhra was separated from Madras in October, 1953 the district of Chittoor became part of the State of Andhra. In 1955 a demand was made upon the father of the appellant for the payment of land cess calculated in accordance with the provisions of sections 78 and 79 of the Act and including in the computation of the "annual rent value" the amounts payable to Government in each year under the mining lease both as surface rent and royalty. The validity of this notice was objected to on grounds which are no longer material and the objections being upheld, the notices were quashed on writ petitions filed to the High Court of Andhra Pradesh by the appellant's father.

¶4 After the decision by the High Court in his favour the appellant's father died. On 10th March, 1958 two notices were issued to the appellant demanding the payment of the sums specified therein as being the cesses for the years 1952 to 1954 and 1955 to 1957 respectively and threatening coercive proceedings for their

recovery in the event of the demand not being complied with. Impugning the validity of the notices of demand for the earlier triennium, the appellant filed Writ Petition No. 534 of 1958 in the High Court of Andhra Pradesh and a similar petition No. 536 of 1958 challenging the validity of the notice of demand for the later period. While these petitions were pending before the High Court a further notice of demand claiming the payment of cess for the years 1958 and 1959 was served on the appellant in August, 1960 and to obtain a similar relief in respect of this notice and the proceedings for the recovery thereof, the appellant has filed Writ Petition No. 302 of 1960 in this Court. To complete the narrative it is only necessary to mention that both the Writ Petitions Nos. 534 and 535 of 1958 were dismissed by the High Court and when the appellant sought to obtain certificates of fitness the learned Judges granted a certificate in respect of their judgment in Writ Petition No. 535 of 1958 on the ground that the value of the claim made against the appellant was over Rs. 20,000, but refused a similar certificate in Writ Petition No. 534 of 1958 where the amount demanded was less than that figure—it was Rs. 15,000 and odd. The appellant thereupon moved this Court for Special Leave in respect of the dismissal of his Writ Petition No. 534 of 1958 and the same having been granted all these three matters have been heard together.

The matter in controversy in the appeal is very limited and the point involved very narrow. Mr. Ramareddi—learned Counsel for the appellant—raised three points in support of the appeal: (1) What is the meaning of the expression ‘royalty’ in section 79 (1) of the Act? Does it include the royalty payable under a mining lease on the ore won by the lessee, (2) Assuming that royalty in the sense mentioned in Point No. 1 is within sections 78 and 79, of the Act the provision imposing the land cess *quoted* royalty under mining leases must be held to be repealed by the Mines and Minerals (Regulation and Development) Act, 1948 (Central Act LIII of 1948) or in any event, by the Mines and Minerals (Regulation and Development) Act, 1957 (Central Act LXVII of 1957), so that after the date when these Central enactments came into force the land cess that could be levied under section 78 must be exclusive of royalty under a mining lease. (3) Is the land cess which was demanded by the impugned notices dated 10th March, 1958 and 29th August, 1960 recoverable as an arrear of land revenue under the law?

We shall examine the submissions in that order. The first contention that the expression ‘royalty’ under section 79 (1) does not signify royalty as commonly understood but is confined to the rent payable for the beneficial use of the surface of the land, scarcely deserves serious consideration. Where the land is held on lease, as in the present case, the lease amount is specifically referred to in section 79 of the Act, as one of the components for the computation of the annual rent value. It is therefore obvious that “royalty” which follows the expression “lease amount” is something other than the return to the lessor or licensor for the use of the land surface and represents as it normally connotes the payment made for the materials or minerals won from the land. The argument is therefore without substance and is rejected.

The second point has not, in our opinion, more merit. The entirety of the argument on this head is based on two decisions of this Court in which this Court had to consider the continued operation of the Orissa Mining Areas (Development Fund) Act, (XXVII of 1952)—*The Hingir-Rampur Coal Co., Ltd and others v. The State of Orissa and others*¹ and *State of Orissa v. M.A. Tullock & Co.*². As a matter of fact it might be mentioned that the present appellant intervened in Civil Appeals 551 and 552 of 1962 and there was a direction by this Court that the present appeals and petition might be heard after the judgment was pronounced in the Orissa appeals. We are, however, clearly of the opinion that neither of the two decisions, the later one really following the earlier in respect of the matter now relevant, really help the appellant in these appeals. In *Hingir-Rampur Coal Co's case*¹, the decision was rendered on writ petitions filed in this Court under Article 32 of the

1. (1961) 2 S.C.R. 537 : A.I.R. 1961 S.C. 459. 2. A.I.R. 1964 S.C. 1284.

Constitution challenging the validity of the Orissa Mining Areas (Development Fund) Act. A cess had been levied under that enactment and it was the validity of the imposition of the cess that was the subject of debate in the petition. One of the points urged in support of the petition was that on the enactment of the Mines and Minerals (Regulation and Development) Act, 1948 (Central Act LIII of 1948) the Orissa Act stood repealed and the cess leviable under its provisions was not thereafter capable of being enforced with the result that the demand for the cess could not be sustained. This Court on a detailed comparison of the provisions of the Orissa Act and the Central Act of 1948 came to the conclusion that the Central Act covered the same field as the Orissa enactment. An examination of the scheme of the Orissa Act disclosed that it had been passed for the purpose of the development of 'mining areas' in the State and this was effected by constituting 'mining areas' and making provision for the development of such areas by improving communication by the construction of roads, by providing means of transport, supply of water, electricity and other amenities for sanitation as also for the education of the labour force to attract workmen to these 'mining areas'. The cess which was there impugned was levied and collected for meeting the cost of this development of the 'mining areas'. The Central enactment which was also passed to provide for the conservation of minerals was held to cover the same field as the Orissa Act. The Orissa State enactment had been passed in pursuance of the legislative power conferred by Entry 23 of the State List in the Seventh Schedule reading

' Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union

The provision in List I referred to here is Entry 54 in the Union List reading

Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by law made by Parliament to be expedient in public interest

It was argued on behalf of the State that the Central Act of 1948 though it contained a declaration that the Regulation and Development of mines and mineral development was expedient in the public interest, still such a declaration was not by "Parliament" as required by Entry No. 54, but by the Dominion Legislature and could not on the terms of Item 23 of List II affect the State power of legislation. This argument was rejected and the State Act was, therefore, held to be competently enacted, and to remain unaffected by the Central Legislation. It was the same enactment of the Orissa legislature that came up for consideration in G As Nos 561 and 562 of 1962. By that date however Parliament had legislated and had enacted Central Act LXVII of 1957 which contained, if anything, more comprehensive provisions for the regulation and development of mines and minerals throughout the country. The Central Act also contained a declaration that

' it was expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided "

This Court held that having regard to the comprehensive provisions contained in the several sections of the Act which were examined, "the extent provided" included those which fell within the scope of the State Act of Orissa which was, as stated earlier, for the regulation and development of "mining areas" within the State. For these reasons it was held that the Orissa Act must be deemed to have been impliedly repealed and rendered ineffective by the Central Act.

It will be seen that there is no resemblance, whatever, between the provisions of the Orissa Act considered in the two decisions and the provision for the levy of the land cess under sections 78 and 79 of the Act with which we are concerned. Sections 78 and 79 have nothing to do and are not concerned with the development of mines and minerals or their regulation. The proceeds of the land cess are, under section 92 of the Act, to be credited to the District fund, into which under the terms of the Finance Rules in Schedule V to the Act, the land cess as well as several other taxes, fees and receipts are directed to be credited. This fund is to be used under Chapter VII of the Act with which section 112 starts "for everything necessary

for or conducive to the safety, health, convenience or education of the inhabitants or the amenities of the local area concerned and everything incidental to the administration" and include in particular the several matters which are mentioned in those sections. It will thus be seen that there is no connection between the regulation and development of mines and minerals dealt with in the Central Acts and the levy and collection of land cess for which provision is made by sections 78 and 79 of the Act. There is therefore no scope, at all, for the argument that there is anything in common between the Act and the Central Acts of 1948 and 1957 so as to require any detailed examination of these enactments for discovering whether there is any overlapping.

It was next urged that the land cess was really a tax on mineral rights falling within Entry 50 of the State List reading :

"Taxes on mineral rights subject to any limitation imposed by Parliament by law relating to mineral development."

and that the Central Acts under which also taxes and fees might be levied brought into play the last portion of this Entry and that as a result the power to impose this tax was not available after the Central Acts of 1948 and 1957 came into force. In this connection Mr. Ramareddi pointed out that as the impugned land cess was payable only in the event of the mining lessee winning the mineral and so paying the royalty and not when no minerals were extracted, it was in effect a tax on the minerals won and therefore on mineral rights. We are unable to accept this argument. When a question arises as to the precise head of legislative power under which a taxing statute has been passed, the subject for enquiry is what in truth and substance is the nature of the tax. No doubt, in a sense, but in a very remote sense it has relationship to mining as also to the mineral won from the mine under a contract by which royalty is payable on the quantity of mineral extracted. But that, does not stamp it as a tax on either the extraction of the mineral or on the mineral right. It is unnecessary for the purpose of this case to examine the question as to what exactly is a tax on mineral rights seeing that such a tax is not leviable by Parliament but only by the State and the sole limitation on the State's power to levy the tax is that it must not interfere with a law made by Parliament as regards mineral development. Our attention was not invited to the provision of any such law enacted by Parliament. In the context of sections 78 and 79 and the scheme of those provisions it is clear that the land cess is in truth a "tax on lands" within Entry 49 of the State List.

Under section 78 of the Act the cess is levied on occupied land on whatever tenure held. The basis of the levy is the "annual rent value", i.e., the value of the beneficial enjoyment of the property. This being the basis of the tax and disclosing its true nature, section 79 provides for the manner in which the "annual rent value" is determined i.e., what is the amount for which the land could reasonably be let, the benefit to the lessor representing the rateable value "or the annual rent value." In the case of ryotwari lands it is the assessment which is payable to the Government that is taken as the rental value being the benefit that accrues to the Government. Where the land is held under lease it is the lease amount that forms the basis. Where land is held under a mining lease, that which the occupier is willing to pay is accordingly treated as the "annual rent value" of the property. Such a rent value would, therefore, necessarily include not merely the surface rent, but the dead rent, as well as the royalty payable by the licensee, lessee or occupier for the user of the property. The position then is that the rent which a tenant might be expected to pay for the property is, in the case of lease-hold interests, treated as the statutory "annual rent value". It is therefore not possible to accept the contention, that the fact that the lessee or licensee pays a royalty on the mineral won, which is in excess of what he would pay if his right over the land extended only to the mere use of the surface land, places it in a category different from other types where the lessee uses the surface of the land alone. In each case the rent which a lessee or licensee actually pays for the land being the test, it is manifest that the land cess is nothing else except a land tax.

Learned Counsel pointed out that in the case of inam lands and other lands dealt with in clauses (i), (iii) and (iv) of section 79 the royalty payable by the lessee or licensee did not figure in the computation of the annual rent value. That, however, appears to us to be wholly irrelevant, for what we are concerned is whether on the terms of sub-clause (i) the land cess is not in truth a tax on land.

The last of the points raised relates to the threat on the part of the Government to recover the impugned demands as an arrear of land revenue. Learned Counsel pointed out that section 221 of the Act which made provision for the recovery of sums due as taxes had, by reason of the changes effected in the rules, ceased to be applicable for the recovery of land cess under section 78. The learned Judges of the High Court upheld this submission and, in our opinion, correctly but this, is of no assistance to the appellant because of section 52 of the Madras Revenue Recovery Act which enacts

"52 All arrears of revenue other than land revenue due to the State Government, all advances made by the State Government for cultivation or other purposes connected with the revenue, and all fees or other dues payable by any person to or on behalf of the village servants employed in revenue or police duties, and all cesses lawfully imposed upon land and all sums due to the State Government including compensation for any loss or damages sustained by them in consequence of a breach of contract, may be recovered in the same manner as arrears of land revenue under the provisions of this Act unless the recovery thereof shall have been or may hereafter be otherwise specially provided for"

It was not disputed that the cess under section 78 would be "a cess lawfully imposed upon land" and would therefore be covered by its terms. The legality of the procedure, which the respondents proposed to adopt for the recovery of the sums could not, therefore, be successfully challenged.

The appeals and the Writ Petition fail and are dismissed with costs—one hearing fee.

K S

———— Appeals and Writ Petition dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO, J C SHAH, N. RAJAGOPALA AYYANGAR AND S M SIKRI, JJ

Mst Rafiquennessa and others

*Appellants**

Lal Bahadur Chettri and others

Respondents

Assam Non-Agricultural Urban Areas Tenancy Act (XII of 1953), section 5—Scope and effect—If applies to appeals pending on the date of coming into force of the Act

The plain object of section 5 of the Assam Non Agricultural Urban Areas Tenancy Act 1953, is to protect tenants who have built a permanent structure either for business or for residence, provided it has been built within five years from the date of contract of tenancy even though those constructions are made before the date of commencement of the Act. What is prohibited by the section is eviction of the tenant and inevitably the section comes into play for the protection of the tenant even at the appellate stage, when it is clear that by the proceedings pending before the appellate Court, the landlord is seeking to evict the tenant, and that obviously indicates that pending proceedings are governed by section 5 (1) (a), though they may have been initially instituted before the Act came into force. An appeal pending before the appellate Court is a continuation of the suit, and so, there is no difficulty in holding that a suit which was pending when the Act came into force would be governed by section 5 (1) (a) and an appeal arising from a suit which had been decided before the Act came into force would likewise be governed by section 5 (1) (a) provided it is pending after the date when the Act came into force.

Further section 2 indicates that the Legislature wanted the beneficial provisions enacted by it to take within their protection not only leases executed after the Act came into force, but also leases executed prior to the operation of the Act.

Appeals from the Judgments and orders dated 1st August, 1958 and 13th March, 1959 of the Assam High Court in S.A Nos 86 of 1958 and 14 of 1959 respectively.

N.C. Chatterjee, Senior Advocate, (*K.P. Sen* and *P.K. Chatterjee*, Advocates with him), for Appellant (In C.A. No. 549 of 1962).

B.P. Maheshwari, Advocate, for Respondents Nos. 1 (a) to 1 (e) (In C.A. No. 549 of 1962).

Behrul Islam and *R. Gopalakrishnan*, Advocates, for Appellant (In C.A. No. 569 of 1963).

D.N. Mukherjee, Advocate, for Respondent (In C.A. No. 569 of 1963).

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—These two appeals which have been brought to this Court with a certificate issued by the Assam High Court, raised a short question about the construction and effect of section 5 of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955 (XII of 1955) (hereinafter called "the Act"). The relevant and material facts which have led to the suits from which these two appeals respectively arise, are similar, and so, it would not be necessary to state them in detail in regard to both the matters. We would, therefore, mention the facts broadly in C.A. No. 549 of 1962, in dealing with the common point raised for our decision. The appellant in this case is Mst. Rafiquennessa who sued the predecessor of the respondents for ejectment. It appears that Lal Bahadur Chetri had executed a registered lease deed in favour of the appellant on the 14th February, 1946. The lease covered an open plot of land and under the covenant the lessee was entitled to build a house for residential purposes. In ordinary course, the lease was due to expire on the 12th February, 1952, and the lessee had agreed to deliver vacant possession of the land at the expiration of the stipulated period. Accordingly, a notice to quit was served on him to vacate on the 12th February, 1952. He, however, did not comply with the notice and that led to the present suit by the appellant for eviction (No. 149 of 1952). In support of her claim, the appellant alleged that the lessee had contravened the terms of the lease inasmuch as he had sublet the premises built, by him, and so, that was an additional ground for evicting the lessee. The sub-lessees were accordingly joined as defendants to the suit.

The lessee Chetri alone resisted the suit. The sub-tenants let into possession by him did not join issue with the appellant. The trial Judge decreed the appellant's claim whereupon the lessee Chetri filed an appeal in the Court of the Sub-Judge, Lower Assam District, Gauhati, challenging the validity and the correctness of the decree passed against him (Civil Appeal No. 24 of 1953).

While the appeal was pending, the Act was passed and was published in the Assam Gazette on the 6th July, 1955. Thereafter, when the appeal came on for hearing before the lower appellate Court, the tenant filed an application praying that he should be permitted to take an additional ground under section 5 of the Act. Before that date, the Assam High Court had taken the view that the said provision of the Act was applicable to the pending proceedings between landlords and tenants for eviction and that was the basis on which the tenant Chetri wanted to support his appeal. The lower appellate Court allowed the tenant's plea, framed an additional issue in pursuance of it and sent the matter back to the trial Court for a finding.

On remand, the trial Court took evidence and after local inspection, made a finding that the two houses proved to have been built by the tenant must be regarded as permanent in relation to the locality of the plot. He, however, found that there was no evidence to show when the said houses were constructed. Part of the finding was challenged by the tenant before the lower appellate Court. The lower appellate Court ultimately allowed the appeal and set aside the decree passed by the trial Judge in favour of the appellant. The conclusion of the lower appellate Court was that the two houses had been constructed by the tenant within five years after the taking of the lease and that entitled the lessee to claim the benefit of section 5 of the Act.

The appellant then preferred a Second Appeal in the High Court of Assam (No 86 of 1958). Following its earlier decision about the applicability of the provisions of section 5 to pending proceedings, the High Court summarily dismissed the said appeal. Thereafter the appellant applied for and obtained a certificate from the High Court and with the said certificate the present appeal has been brought before us. Pending these proceedings, the tenant Chetri died and his heirs and legal representatives Mst Tulsa Devi and others have been brought on the record and will be described as respondents hereafter. Thus, the only point which arises for our decision is whether the Assam High Court was right in taking the view that the provisions of section 5 applied to the proceedings between the parties which were pending at the relevant time before the lower appellate Court.

Appeal No 569 of 1963 arises from a suit filed by the appellant Wahedula against his tenant, the respondent Abdul Hamud. The relevant facts are similar to those in C.A. No 549 of 1962. In this case also the Act came into force while the appeal was pending before the lower appellate Court and by the application of section 5 the respondent's claim to continue in possession has been upheld and the appellant's claim for ejecting the respondent has been rejected. The High Court granted certificate to the appellant when it was told that the appellant proposed to challenge the correctness of its earlier decision holding that section 5 of the Act applied to the pending proceedings.

The Act was passed by the Assam Legislature in order to regulate in certain respects the relationship between landlord and tenant in respect of non agricultural lands in the urban areas of the State of Assam. It contains fourteen sections and the scheme which is evident in the operative provisions of the Act is to afford protection to the tenants by regulating in certain respects the relationship between them and their landlords in respect of the lands covered by the Act. Section 3 (c) defines a 'landlord' as meaning a person immediately under whom a tenant holds but does not include the Government. While section 3 (d) defines a 'permanent structure' in relation to any locality as meaning a structure which is regarded as permanent in that locality, the 'tenant' and 'urban area' are defined by clauses (g) and (h) respectively. Section 4 imposes an obligation on the tenant to pay rent for his holding at fair and equitable rates, and the Proviso prescribes that in case of any dispute as to fair rent between the parties, the rent which was paid by the tenant immediately before the dispute shall be deemed to be fair and equitable unless a competent Court decides to the contrary. Section 6 provides for compensation for improvements, section 7 provides for enhancement of rent by contract, section 8 deals with enhancement of rent without contract, section 9 authorises the Court to make an order as to enhancement of rent, section 10 prohibits illegal realisation beyond the prescribed amount, section 11 provides for notice for ejectment, section 12 prescribes the procedure in which the notice has to be served, and section 13 confers rule making power on the State Government. Section 14 repeals the earlier Tenancy Act.

Having thus broadly considered the scheme of the Act, it is necessary to read section 5, the effect of which is the main point of controversy between the parties before us. Section 5 (1) reads thus:

'Notwithstanding anything in any contract or in any law for the time being in force—(a) where under the terms of a contract entered into between a landlord and his tenant whether before or after the commencement of this Act a tenant is entitled to build and has in pursuance of such terms actually built within the period of five years from the date of such contract a permanent structure on the land of the tenancy for residential or business purposes or where a tenant not being so entitled to build has actually built any such structure on the land of the tenancy for any of the purposes aforesaid with the knowledge and acquiescence of the landlord the tenant shall not be ejected by the landlord from the tenancy except on the ground of non payment of rent, (b) where a tenant has effected improvements on the land of the tenancy under the terms whereof he is not entitled to effect such improvements, the tenant shall not be ejected by the landlord from the land of the tenancy unless compensation for reasonable improvements has been paid to the tenant.'

Sub-section (2) prohibits the ejectment of any tenant from the land of the tenancy except in execution of a decree for ejectment passed by a competent civil Court, and sub-section (3) prohibits the execution of a decree for ejectment on the ground

of non-payment of rent within a period of 30 days from the date of the decree, and allows the tenant to pay into the executing Court the entire amount due from him under the decree within the said period, whereupon the decree has to be entered as satisfied.

Mr. Chatterjee contends that the Assam High Court was in error in coming to the conclusion that the proceedings which were pending between the parties at the appellate stage on 6th July, 1955 when the Act came into force, fell to be governed by the provisions of section 5. He argues that at the relevant date when the suit was filed by the appellant, he had acquired a right to eject the tenant under the terms of the tenancy, and he contends that where vested rights are affected by any statutory provision, the said provision should normally be construed to be prospective in operation and not retrospective, unless the provision in question relates merely to procedural matter. It is not disputed by him that the Legislature is competent to take away vested rights by means of retrospective legislation. Similarly, the Legislature is undoubtedly competent to make laws which over-ride and materially affect the terms of contracts between the parties; but the argument is that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law, no objection can be taken to them. Mr. Chatterjee has relied upon the well known observations made by Wright J. in (*Re Athlumney Ex parte or Wilson*¹), when the learned Judge said that it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. He added that there was one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights. In order to make the statement of the law relating to the relevant rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, we ought to add that retrospective operation of a statutory provision can be inferred even in cases where such retroactive operation appears to be clearly implicit in the provision construed in the context where it occurs. In other words, a statutory provision is held to be retroactive either when it is so declared by express terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur.

Bearing in mind these principles, let us look at section 5. Before doing so, it is necessary to consider section 2 which provides that notwithstanding anything contained in any contract or in any law for the time being in force, the provisions of this Act shall apply to all non-agricultural tenancies whether created before or after the date on which this Act comes into force. This provision clearly indicates that the Legislature wanted the beneficent provisions enacted by it to take within their protection not only leases executed after the Act came into force, but also leases executed prior to the operation of the Act. In other words, leases which had been created before the Act applied are intended to receive the benefit of the provisions of the Act, and in that sense, the Act clearly affects vested rights of the landlords who had let out their urban properties to the tenants prior to the date of the Act. That is one important fact which is material in determining the scope and effect of section 5.

Now, section 5 itself gives an unmistakable indication of the legislative intention to make its provisions retrospective. What does section 5 provide? It provides protection to the tenants who have actually built within five years from the date of leases executed in their favour, permanent structures on the land let out to them for residential or business purposes, and this protection is available

either when the construction of the permanent structure has been made by the tenant in pursuance of the terms of the lease, or even without any term of that kind and the landlord had knowledge of it and had acquiesced in it. Thus, the plain object of Section 5 is to protect the tenants who have built a permanent structure either for business or for residence, provided it has been built within 5 years from the date of contract of tenancy. Therefore, cases where permanent structures had been built within 5 years of the terms of contract, would fall within section 5 (1) (a), even though those constructions had been made before the date of the Act. Thus the very scheme of section 5 (1) (a) clearly postulates the extension of its protection to constructions already made. That is another point which is significant in dealing with the controversy between the parties before us.

There is yet another point which is relevant in this connection. Section 5 (1) (a) provides that the tenant shall not be evicted by the landlord from the tenancy except on the ground of non payment of rent, provided, of course, the conditions prescribed by it are satisfied. If the Legislature had intended that this protection should operate prospectively, it would have been easy to say that the tenant shall not be sued in ejectment, such an expression would have indicated that the protection is afforded to the suits brought after the Act came into force and that might have introduced the element of prospective operation, instead, what is prohibited by section 5 (1) (a) is the eviction of the tenant, and so, inevitably, the section must come into play for the protection of the tenant even at the appellate stage when it is clear that by the proceedings pending before the appellate Court, the landlord is seeking to evict the tenant, and that obviously indicates that the pending proceedings are governed by section 5 (1) (a), though they may have been initially instituted before the Act came into force.

Incidentally, an appeal pending before the lower appellate Court is a continuation of the suit, and so, there is no difficulty in holding that a suit which was pending when the Act came into force would be governed by section 5 (1) (a) and an appeal arising from a suit which had been decided before the Act came into force would likewise be governed by section 5 (1) (a), provided it is pending after the date when the Act came into force. Therefore, we are satisfied that the Assam High Court was right in coming to the conclusion that the dispute between the parties in the present case must be governed by the provisions of section 5 (1) (a). It is common ground that if section 5 (1) (a) is held to apply, the decrees passed against the appellants in both the appeals cannot be successfully challenged.

The result is, the appeals fail and are dismissed with costs.

K S

Appeals dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, Chief Justice, K N WANCHOO, J C SHAH, N RAJAGOPALA AYYANGAR AND S M SIKRI, JJ

Basant Kumar Sarkar and others

*Appellants**

v

The Eagle Rolling Mills Ltd, and others

Respondents

Employees State Insurance Act (XXXIV of 1948) section 1 (3)—Validity—If bad as conferring delegation of legislative powers—Employees hitherto having better facilities—If can challenge the act of Management substituting benefit under Act by writ under Article 226 of the Constitution of India

Section 1 (3) of the Employees' State Insurance Act (XXXIV of 1948) is not an illustration of delegated legislation at all, it is what can be properly described as conditional legislation. The Legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it and leaves to the Government concerned to decide when, how and in what manner the scheme should be introduced. That cannot amount to excessive delegation.

Section 1 (3) of the Act is not constitutionally invalid.

Where the employers who were till then providing medical benefits to their employees issue notice that such benefits would be received by them under the relevant provisions of the Act, the remedy of the workmen is to ventilate their grievances in respect of such notices by recourse to section 10 of the Industrial Disputes Act or seek relief if possible under sections 74 and 75 of the Employees' State Insurance Act. The question could not be considered under Article 226 of the Constitution of India.

Appeals by Special Leave from the Judgment and Order dated 1st March, 1961 of the Patna High Court in Misc. Judicial Cases Nos. 1167, 1122 and 1235 of 1960.

N. C. Chatterjee, Senior Advocate (*Raj Behari Singh* and *Udai Pratap Singh*, Advocates, with him), for Appellants (In all the Appeals).

B. P. Singh, *N. P. Singh* and *I. N. Shroff*, Advocates, for Respondent No. 1. (In all the Appeals.)

C. K. Daphtary, Attorney-General of India and *N. S. Bindra*, Senior Advocate, (*V. D. Mahajan* and *B. R. G. K. Achar*, Advocates, with them), for Respondents Nos. 2 and 3 (In all the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The short question which arises in these appeals by Special Leave is whether section 1 (3) of the Employees' State Insurance Act No. (XXXIV of 1948) (hereinafter called the Act) is invalid. By their writ petitions filed before the Patna High Court, the appellants who are the workmen of the three respondent concerns, the Eagle Rolling Mills Ltd., the Kumardhubi Engineering Works Ltd., and Kumardhubi Fire Clay and Silica Works Ltd., respectively, alleged that the impugned section has contravened Article 14 of the Constitution, and suffers from the vice of excessive delegation, and as such is invalid. These employers were impleaded as respondent No. 1 respectively in the three writ petitions. The High Court has rejected the plea and the writ petitions filed by the appellants have accordingly been dismissed. It is against this decision of the High Court that the appellants have come to this Court and have impleaded the three employers respectively. The three appeals proceed on similar facts and raise an identical question of law and have, therefore, been heard together.

It appears that respondents No. 1 in all the three appeals are under the management of M/s. Bird & Co., Ltd., through a General Manager, and the appellants are their workmen. As such workmen, the appellants were getting satisfactory medical benefits of a very high order free of any charge. Respondent No. 1 in each appeal maintained a well-furnished hospital with provision for 60 permanent beds for the workmen, their families and their dependents. The main grievance made by the appellants is that as a result of section 1 (3) of the Act, the appellants have now to be content with medical benefits of a less satisfactory nature. That is why they challenged the validity of the impugned section and contest the propriety and legality of the notification issued under it. To these writ petitions as well as to the appeals, the Employees' State Insurance Corporation and the Union of India have been impleaded as respondents 2 and 3 respectively.

On the 22nd August, 1960, respondent No. 3 issued a notification under section 1, sub-section (3) appointing the 28th August, 1960, as the date on which some provisions of the Act should come into force in certain areas of the State of Bihar. By this notification, the area in which the appellants are working came within the scope of the Act. In pursuance of the said notification, the Chief Executive Officer of respondent No. 1 informed the appellants on the 25th August, 1960, that the medical benefits including indoor and outdoor treatment upto the extent admissible under the Act, will cease to be provided to insurable persons from the appointed day. A notice in that behalf was duly issued and published by the said Officer. Similar notices were issued indicating to the appellants that medical benefits would thereafter be governed by the relevant provisions of the Act and not by the arrangement which had been made earlier by respondent No. 1 in that behalf. That, in brief, is the genesis of the present writ petitions and the nature of the dispute between the parties.

The first point which Mr Chatterjee has raised before us is that section 1 (3) of the Act suffers from excessive delegation and is, therefore, invalid. In order to consider the validity of this argument, it is necessary to read section 1, sub-section (3) —

* The Act shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette appoint, and different dates may be appointed for different provisions of this Act and for different States or for different parts thereof

The argument is that the power given to the Central Government to apply the provisions of the Act by notification, confers on the Central Government absolute discretion, the exercise of which is not guided by any legislative provision and is, therefore, invalid. The Act does not prescribe any considerations in the light of which the Central Government can proceed to act under section 1 (3) and such uncanalised power conferred on the Central Government must be treated as invalid. We are not impressed by this argument. Section 1 (3) is really not an illustration of delegated legislation at all, it is what can be properly described as conditional legislation. The Act has prescribed a self contained Code in regard to the insurance of the employees covered by it, several remedial measures which the Legislature thought it necessary to enforce in regard to such workmen have been specifically dealt with and appropriate provisions have been made to carry out the policy of the Act as laid down in its relevant sections. Section 3 (1) of the Act purports to authorise the Central Government to establish a Corporation for the administration of the scheme of Employees' State Insurance by a notification. In other words, when the notification should be issued and in respect of what factories it should be issued has been left to the discretion of the Central Government and that is precisely what is usually done by conditional legislation. What Lord Selborne said about the powers conferred on the Lieutenant Governor by virtue of the relevant provisions of Act XXII of 1869 in *Queen v Burah*¹, can be said with equal justification about the powers conferred on the Central Government by section 1 (3). Said Lord Selborne in that case

* Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant Governor (large as they undoubtedly are) as if when they were exercised the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor General in Council. Their whole operation is directly and immediately under and by virtue of the Act (XXII of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled the legislation is now absolute.

That is the first answer to the plea raised by Mr Chatterjee.

Assuming that there is an element of delegation, the plea is equally unsustainable, because there is enough guidance given by the relevant provisions of the Act and the very scheme of the Act itself. The Preamble to the Act shows that it was passed because the Legislature thought it expedient to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. So, the policy of the Act is unambiguous and clear. The material definitions of "benefit period", "employee", "factory", "insured person", "sickness", "wages" and other terms contained in section 2 give a clear idea as to the nature of the factories to which the Act is intended to be applied, the class of persons for whose benefit it has been passed and the nature of the benefit which is intended to be conferred on them. Chapter II of the Act deals with the Corporation, Standing Committee and Medical Benefit Council and their constitution, Chapter III deals with the problem of finance and audit, Chapter IV makes provisions for contribution both by the employees and the employer, and Chapter V prescribes the benefits which have to be conferred on the workmen, it also gives general provision in respect of those benefits. Chapter V-A deals with transitory provisions, Chapter VI deals with the adjudication of disputes and claims, and Chapter VII prescribes penalties. Chapter VIII which

is the last Chapter, deals with miscellaneous matters. In the very nature of things it would have been impossible for the Legislature to decide in what areas and in respect of which factories the Employees' State Insurance Corporation should be established. It is obvious that a scheme of this kind, though very beneficent, could not be introduced in the whole of the country all at once. Such beneficial measures which need careful experimentation have sometimes to be adopted by stages and in different phases, and so, inevitably, the question of extending the statutory benefits contemplated by the Act has to be left to the discretion of the appropriate Government. "Appropriate Government" under section 2 (1) means in respect of establishments under the control of the Central Government or a railway administration or a major port or a mine or oil-field, the Central Government, and in all other cases, the State Government. Thus it is clear that when extending the Act to different establishments, the relevant Government is given the power to constitute a Corporation for the administration of the scheme of Employees' State Insurance. The course adopted by modern Legislatures in dealing with welfare scheme has uniformly conformed to the same pattern. The Legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it and leaves it to the Government concerned to decide when, how and in what manner the scheme should be introduced. That, in our opinion, cannot amount to excessive delegation.

The question of excessive delegation has been frequently considered by this Court and the approach to be adopted in dealing with it is no longer in doubt. In the *Edward Mills Co., Ltd., Beawar and others v. The State of Ajmer and another*¹, this Court repelled the challenge to the validity of section 27 of the Minimum Wages Act, 1948 (XI of 1948), whereby power had been given to the appropriate Government to add to either part of the Schedule any employment in respect of which it was of opinion that minimum wages shall be fixed by giving notification in a particular manner, and it was provided that on the issue of the notification, the scheme shall, in its application to the State, be deemed to be amended accordingly. In dealing with this problem, this Court observed that there was an element of delegation implied in the provisions of section 27, for the Legislature, in a sense, authorised another body specified by it to do something which it might do itself; but it was held that such delegation was not unwarranted and unconstitutional and it did not exceed the limits of permissible delegation. To the same effect are the recent decisions of this Court in *Messrs. Bhikusa Yamas Kashatriya and another v. Sangamner Akola Taluka Bidi Kamgar Union and others*², and *Bhikusa Yamas Kashatriya (P.) Ltd. v. Union of India and another*³. Therefore, we must hold that the impugned section 1 (3) of the Act is not shown to be constitutionally invalid.

Before we part with these appeals, there is one more point to which reference must be made. We have already mentioned that after the notification was issued under section 1 (3) by respondent No. 3 appointing 28th August, 1960 as the date on which some of the provisions of the Act should come into force in certain areas of the State of Bihar, the Chief Executive Officer of respondent No. 1 issued notices giving effect to the State Government's notification and intimating to the appellants that by reason of the said notification, the medical benefits which were being given to them in the past would be received by them under the relevant provisions of the Act. It was urged by the appellants before the High Court that these notices were invalid and should be struck down. The argument which was urged in support of this contention was that respondent No. 1 in all the three appeals were not entitled to curtail the benefits provided to the appellants by them and that the said benefits were not similar either qualitatively or quantitatively to the benefits under the scheme which had been brought into force under the Act. The High Court has held that the question as to whether the notices and circulars issued by respondent No. 1 were invalid, could not be considered under Article 226 of the Constitution; that is a matter which can be appropriately raised in the form of a dispute by the appellants under section 10 of the Industrial Disputes Act. It is true that the powers con-

1. (1955) S.C.J. 42 : (1955) 1 M.L.J. (S.C.)
13 : (1955) 1 S.C.R. 735,

2. A.I.R. 1963 S.C. 806.

3. A.I.R. 1963 S.C. 1591.

ferred on the High Court, under Article 226 are very wide, but it is not suggested by Mr Chatterjee that even these powers can take in within their sweep industrial disputes of the kind which this contention seeks to raise. Therefore, without expressing any opinion on the merits of the contention, we would confirm the finding of the High Court that the proper remedy which is available to the appellants to ventilate their grievances in respect of the said notices and circulars is to take recourse to section 10 of the Industrial Disputes Act, or seek relief, if possible, under sections 74 and 75 of the Act.

The result is, the appeals fail and are dismissed. There would be no order as to costs.

K S

Appeals dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, Chief Justice, K N WANCHOO, J C. SHAH N RAJAGOPALA AYYANGAR and S M SIKRI, JJ

B Rajagopala Naidu

*Appellant**

v

The State Transport Appellate Tribunal, Madras and others

Respondents

The Anamallais Bus Transport (P), Ltd, Pollachi, Coimbatore District, Madras State

Intervener

Motor Vehicles Act (IV of 1939), section 43-A (inserted by Madras Amendment Act XX of 1948)—Scope and nature of powers conferred—G O No 1298 issued by Government on 28th April, 1956 in exercise of its powers conferred by section 43-A—Validity—Order of Tribunal based on the G O—If can be set aside under Article 226 of the Constitution of India (1950)

Section 43 A inserted by Madras Act XX of 1948 in the Motor Vehicles Act, 1939 is valid and was intended to clothe the Madras Government with authority to issue directions of an administrative character. G O No 1298 issued by the Government of Madras on 28th April, 1956 purported to issue instructions or direction for the guidance of the Tribunal constituted under the Motor Vehicles Act in the disposal of claims for permits. When applications are made for permits under the relevant provisions of the Motor Vehicles Act and they are considered on the merits, particularly in the light of evaluation of the claim of the respective parties, the Transport Authorities are exercising quasi judicial powers and the orders made in discharging those functions are quasi judicial orders which are subject to the jurisdiction of the High Court under Article 226. The order G O No 1298 is concerned with matters which fall to be determined by the appropriate Transport Authorities in exercise of their quasi judicial powers and discharge of their quasi judicial functions.

On a fair and reasonable construction of section 43 A of the Act it ought to be held that the said section authorises the State Government to issue orders and directions of a general character only in respect of administrative matters which fall to be dealt with by the State Transport Authority or Regional Transport Authority under the relevant provisions of the Act in their administrative capacity. The orders and directions in the impugned G O No 1298 of 28th April, 1956 are not statutory rules and cannot therefore seek to fetter the exercise of quasi judicial powers conferred on the Tribunals which deal with applications for permits and other cognate matters. Any attempt to trespass on the jurisdiction of the Tribunals must be held to be outside the purview of section 43-A.

As in the instant case the decision of the Appellate Tribunal was based solely on the provisions of the impugned order and since the said order is invalid, the decision itself must be corrected by the issue of a writ of *certiorari*.

Appeal by Special Leave from the Judgment and Order dated 29th October, 1963 of the Madras High Court in Writ Appeal No 214 of 1962

S Mohan Kumar Mangalam, Senior Advocate (M N Rangachari, Advocate and R K Garg and M K Ramamurthi, Advocates of M/s Ramamurthi & Co, with him), for Appellant

R Ganapathy Jyer, Advocate, for Respondents Nos 2 and 3

A Ranganadham Chetty, Senior Advocate, (A V Rangam, Advocate, with him) for Respondent No 4

M. C. Setalvad, Senior Advocate (*N. G. Krishna Iyengar*, Advocate, and *Onkar Chand Mathur*, Advocate, of *Ms/. J. B. Dadachanji & Co.*, with him), for Intervener.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The short but important point of law which has been raised for our decision in this appeal by Special Leave is whether G.O. No. 1298 issued by the Government of Madras on 28th April, 1956 in exercise of its powers conferred by section 43-A of the Motor Vehicles Act, 1939 (Central Act IV of 1939) (hereinafter called the Act) inserted by the Madras Amending Act XX of 1948, is valid. Mr. Mohan Kumara Mangalam who appears for the appellant contends that the impugned Government Order is invalid for the simple reason that it is outside the purview of section 43-A. The impugned order was issued as early as 1956 and since then, its validity has never been impeached in judicial proceedings. Litigation in regard to the grant of permits under the relevant provisions of the Act has figured prominently in the Madras High Court in the form of writ petitions invoking the said High Court's jurisdiction under Article 226 of the Constitution and several aspects of the impugned order have come to be examined. The echoes of such litigation have frequently been heard in this Court and this Court has had occasion to deal with the impugned order, its character, its scope and its effect ; but on no occasion in the past, the validity of the order appears to have been questioned. The legislative and judicial background of the order and the course of judicial decisions in regard to the points raised in the enforcement of this order would *prima facie* and at the first blush suggest that the attack against the validity of the order may not be well-founded and that would tend to make the initial judicial response to the said challenge more hesitant and reluctant. But Mr. Kumara Mangalam contends that section 43-A under which the order purports to have been passed would clearly show that the said order is outside the purview of the authority conferred on the State Government and is therefore invalid. It is obvious that if this contention is upheld, its impact on the administration of the system adopted in the State of Madras for granting permits under the Act would be very great and so though the question lies within a narrow compass, it needs to be very carefully examined. The facts which lead to the present appeal conform to the usual pattern of the permit litigation in which the grant or refusal to grant a permit is challenged under the writ jurisdiction of the High Court under Article 226.

The appellant B. Rajagopala Naidu is a bus operator in the State of Madras and he runs a number of buses on various routes. On 26th June, 1956, the State Transport Authority by a notification invited applications for the grant of two stage carriage permits on the route Madras to Krishnagiri. The buses on this route were to be run as express service. The appellant and 117 bus operators including respondents 2 and 3 D. Rajabahal Mudaliar, proprietor of Sri Sambandamoorthy Bus Service and K. H. Hanumantha Rao, proprietor of Jeevajyoti Bus Service respectively, submitted applications for the two permits in question. The State Transport Authority considered the said applications on the merits. In doing so, it proceeded to award marks in accordance with the principles prescribed by the impugned order and came to the conclusion that the appellant satisfied the requirements enunciated by the State Transport Authority for running an efficient bus service on this long route, and so, it granted the two permits to the appellant on 8th May, 1958.

Against this decision 18 appeals were preferred by the unsuccessful applicants including respondents 2 and 3. All these appeals were heard together by the State Transport Appellate Tribunal, Madras in June, 1959. It appears that before the appeals were thus heard, the State Government had superseded the principles enunciated in the order in so far as they related to the grant of stage carriage permits and had issued another direction under section 43-A known as G.O. No. 2265 on 9th August, 1958. Incidentally, it may be added that by this order, different criteria had been prescribed for selection and a different marking system had been devised. The Appellate Tribunal considered the claims of the rival bus operators and allotted marks in accordance with the principles laid down by the earlier order. As a

result, respondents 2 and 3 secured the highest marks and their appeals were allowed the order under appeal was set aside and two permits were granted to them. This order was passed on 4th July, 1959.

The appellant then invoked the jurisdiction of the Madras High Court under Article 226 of the Constitution by his Writ Petition No. 692 of 1959. In his writ petition the appellant challenged the validity of the order passed by the Appellate Tribunal on several grounds. One of them was that the impugned order on which the decision of the Appellate Tribunal was based, was invalid. This plea along with the other contentions raised by the Appellant failed and the learned Single Judge who heard his writ petition dismissed the petition, on 18th October, 1962. The appellant then challenged the correctness of this decision by a Letters Patent Appeal No. 214 of 1962 before a Division Bench of the said High Court. The Division Bench however agreed with the view taken by the Single Judge and dismissed the Letters Patent Appeal preferred by the appellant. The appellant then moved the said High Court for leave but failed to secure it, and that brought him here with an application for Special Leave which was granted on 14th November, 1963. It is with this Special Leave that the appellant has brought this appeal before us for final disposal.

Before dealing with the points raised by the appellant, it is necessary to consider the background of the impugned order, and that takes us to the decision of the Madras High Court in *Sri Ram Vilas Service, Ltd v. The Road Traffic Board, Madras by its Secretary*¹. In that case, the appellant had challenged the validity of a Government Order No. 3898 which had been issued by the Madras Government on 9th December, 1946. This order purported to direct the Transport Authorities to issue only temporary permits as the Government intended to nationalise motor transport. Accordingly instruction No. 2 in the said order had provided that when applications were made for new routes or new timings in existing routes, then small units should be preferred to old ones. In accordance with this instruction, when the application for permit made by the appellant, Sri Rama Vilas Service was rejected the order stated that it so rejected in the interests of the public generally under section 47 (1) (a) of the Act. The appellant preferred an appeal against the order to the Central Board namely the Provincial Transport Authority which had been constituted by the Government under section 44 of the Act. His appeal failed and so, he moved the Madras High Court under section 45 of the Specific Relief Act for an order directing the respondent—the Road Traffic Board, Madras—to consider the application of the appellant in accordance with the provisions of the Act and the Rules made thereunder for renewal of the permit for plying buses. The High Court held that G.O. No. 3898 was in direct conflict with the Proviso to section 58, sub-section (2) of the Act, and so was invalid. This decision showed that there was no authority or right in the State Government to issue instructions, such as were contained in the said Government Order. In reaching this decision, the High Court emphasised the fact that the Central Transport Board and the Regional Transport Board were completely independent of the Government except that they must observe the notifications made pursuant to section 43 of the Act. It was conceded that if and when the Government acted as an Appellate Tribunal, it had judicial functions to discharge. But these functions did not include the power to give orders to any Board which was seized of an application for renewal of permits. That is how it was established by this decision that as the Act stood, the State Government had no authority to issue directions as to how applications for permits or their renewal should be dealt with by the Tribunals constituted under the Act. This judgment was pronounced on 1st November, 1947.

As a result of this judgment, the Madras Legislature amended the Central Act by Act XX of 1948 which came into force on 19th December, 1948. Amongst the amendments made by this Act was the insertion of section 43 A with which we are concerned in the present appeal. This section clothed the State Government with powers to issue certain directions and orders. As we have already indicated

the point which we are considering in the present appeal is whether the impugned order falls within the purview of the power and authority conferred on the State Government by this section. We will read this section later when we address ourselves to the question of its construction.

The amendment of the Central Act led to the next round of controversy between the bus operators and the State Government and that resulted in the decision of the Madras High Court in *C.S.S. Motor Service, Tenkasi v. The State of Madras and another*¹. In that case, the validity of several provisions of the Act including the provisions introduced by the Madras Amendment Act were challenged. It will be recalled that at the time when this challenge was made, the Constitution had come into force and the appellant C.S.S. Motor Service urged before the High Court that under Article 19 (1) (g) it had a fundamental right to ply motor vehicles on the public pathways and the impugned provisions of the Act invaded its aforesaid fundamental right and were not justified by Article 19 (6). The High Court elaborately considered the first part of the contention and it took the view, and we think rightly, that a citizen has a fundamental right to ply motor vehicles on the public pathways for hire or otherwise and that if any statutory provision purports or has the effect of abridging such fundamental right, its validity would have to be judged under the relevant clause of Article 19. Proceeding to deal with the dispute on this basis, the High Court examined the validity of the several impugned provisions of the Act. In regard to section 43-A, the High Court came to the conclusion that the said section was valid though it took the precaution of adding that the orders passed thereunder might be open to challenge as unconstitutional. It is, however, necessary to emphasise that the main reason which weighed with the High Court in upholding the validity of this section was that the High Court was satisfied that the said section was "intended to clothe the Government with authority to issue directions of an administrative character". Thus, section 43-A was held to be valid in this case and the correctness of this conclusion is not disputed before us. In other words, we are dealing with the appellant's challenge against the validity of the impugned order on the basis that section 43-A itself is valid. This judgment was pronounced on 25th April, 1952.

Some years after this judgment was pronounced, the impugned Government Order was issued on 28th April, 1956. This order purported to issue instructions or direction for the guidance of the Tribunal constituted under the Act. In fact, it refers to the judgment of the Madras High Court in the case of *C.S.S. Motor Service*¹. It would appear that the Madras Government wanted to give effect to the said decision by issuing appropriate directions under its authority derived from section 43-A which was held to be valid. The impugned order deals with five topics. The first topic has relation to the instructions which had to be borne in mind whilst screening the applicants who ask for permits. This part of the order provides that the applicants may be screened and disqualified on one or more of the principles enunciated in clauses 1 to 4 in that part. The second part deals with the system of assigning marks to the several claimants, under four columns. In laying down these principles, the impugned order intended to secure precision in the disposal of claims for permits and to enable quick consideration of the merits of such claimants. This part of the order, however, made it clear that in cases where the system of marking worked unfairly the Regional Transport Authority may ignore the marks obtained for reasons to be stated. It is this part of the order which has introduced the marking system which has been the special feature of adjudication of claims for permits in the State of Madras. These two parts are described as 'A' in the Government Order. Part 3 deals with the question of the variation or extension of routes granted under the permits. Part 4 deals with the revision of timings and Part 5 has reference to suspension or cancellation of permits. That in brief is the nature of the directions issued by the impugned order.

After this order was issued and the Tribunals constituted under the Act began to deal with applications for permits in accordance with the principles prescribed

by it, the decision of the said Tribunal¹ came to be frequently challenged before the Madras High Court and these disputes have, often been brought before this Court as well. In these cases, the character of the order passed by the Tribunal was examined the nature of the instructions issued by the impugned order was considered and the rights of the parties aggrieved by the quasi judicial decision of the tribunals also fell for discussion and decision. A question which was often raised was whether it was open to a party aggrieved by the decision of the Tribunal to contend that the said decision was based either on a misconstruction of the impugned order or in contravention of it, and the consensus of judicial opinion on this part of the controversy appears to be that the proceedings before the Tribunal constituted under the Act are quasi judicial proceedings and as such liable to be corrected under Article 226 of the Constitution. It also appears to be well established that the impugned order is not a statutory rule and has therefore no force of law. It is an administrative or executive direction and it is binding on the tribunals², it does not, however, confer any right on the citizen and that means that a citizen cannot be allowed to contend that a misconstruction of the order or its contravention by any decision of the Tribunal functioning under the Act should be corrected under Article 226.

In *M/s Raman and Raman, Ltd v The State of Madras and others*³, this Court by a majority decision held that section 43 A of the Act as amended by the Madras Amendment Act, 1948 must be given a restricted meaning and the jurisdiction it conferred on the State Government to issue orders and directions must be confined to administrative functions. An order or direction made thereunder by the State Government was consequently denied the status of law regulating rights of parties and was treated as partaking of the character of an administrative order. Similarly, in *R Abdulla Rowther v The State Transport Appellate Tribunal, Madras and others*⁴, this Court held by a majority decision that the orders and directions issued under section 43 A were merely executive or administrative in character and their breach even if patent, would not justify the issue of a writ of *certiorari*. It was also observed that though the orders were executive and did not amount to statutory rules they were rules binding on the Transport Authorities for whose guidance they have been issued but that did not confer any right on the citizen and so a plea that a contravention of the orders should be corrected by the issue of an appropriate writ was rejected. Such contravention, it was held, might expose the Tribunal to the risk of disciplinary or other appropriate action, but cannot entitle a citizen to make a complaint under Article 226. It is necessary to emphasise that in both these cases no argument was urged that the impugned order is itself invalid and should have been ignored by the Tribunal exercising quasi judicial authority under the relevant provisions of the Act. The Court was no doubt called upon to consider the character of the impugned order and some of the reasons given in support of the conclusion that the impugned order is administrative or executive seem to suggest that the said order would, *prima facie*, be inconsistent with the provisions of section 43 A which received a narrow and limited construction from the Court. Nevertheless, since the point about the validity of the impugned order was not raised before the Court, this aspect of the question was not examined and the discussion and decision proceeded on the basis that the impugned order was valid. Now that the question has been raised before us, it has become necessary to examine the validity of the impugned order.

Before proceeding to examine the scope and effect of the provisions of section 43 A, it is necessary to bear in mind two general considerations. The first broad consideration which is relevant has relation to the scheme of the Act in general and the scheme of Chapter IV in particular. The Act consists of 10 chapters and deals mainly with administrative problems in relation to motor vehicles. Chapter II deals with licensing of drivers of motor vehicles. Chapter II-A deals with licensing of conductors of stage carriages and Chapter III with registration of motor vehicles.

¹ (1959) 2 S.C.R. 227 (1959) S.C.J. 1156 (S.C.) 236.
 (1959) 2 M.L.J. (S.C.) 236 (1959) 2 An.W.R. 2 A.I.R. 1959 S.C. 896

Chapter IV is concerned with the control of transport vehicles and in this chapter are included the relevant provisions for the applications for grant of permits, the consideration of those applications and other allied topics. Chapter IV includes the provisions relating to State Transport Undertakings. Chapter V addresses itself to the construction, equipment and maintenance of motor vehicles, Chapter VI deals with the control of traffic, Chapter VII has referred to motor vehicles temporarily leaving or visiting India, Chapter VIII with the question of insurance of motor vehicles against third party risks, Chapter IX prescribes offences and procedures to try the offences and Chapter X contains miscellaneous provisions.

This scheme shows that the hierarchy of Transport Authorities contemplated by the relevant provisions of the Act is clothed both with administrative and quasi-judicial functions and powers. It is well settled that sections 47, 48, 57, 60, 64, and 64-A deal with quasi-judicial powers and functions. In other words, when applications are made for permits under the relevant provisions of the Act and they are considered on the merits, particularly in the light of evaluation of the claim of the respective parties, the Transport Authorities are exercising quasi-judicial powers and orders made discharging those functions are quasi-judicial orders which are subject to the jurisdiction of the High Court under Article 226, vide *New Prakash Transport Co., Ltd. v. New Suvarna Transport Co., Ltd.*¹, and *Messrs. Raman and Raman Ltd. v. The State of Madras and others*², and *R. Abdulla Rowther v. The State Transport Appellate Tribunal, Madras and others*³, so that when we examine the question about the validity of the impugned order, we cannot lose sight of the fact that the impugned order is concerned with matters which fall to be determined by the appropriate Transport Authorities is exercise of their quasi-judicial powers and in discharge of their quasi-judicial functions.

The other broad consideration relevant in dealing with the present controversy is that there are three sets of provisions under the Act which confer legislative, judicial and administrative powers respectively on the State Government. Section 67 which confers on the State Government power to make Rules as to stage carriages and contract carriages and section 68 which confers power on the State Government to make Rules for the purposes of Chapter IV are obviously legislative powers, and in exercise of these powers, when the Rules are framed they become statutory Rules which have the force of law. Naturally, the exercise of these legislative powers is controlled by the safeguard provided by section 133 of the Act. This latter section requires that when power is exercised by the State Government to make Rules, it is subject to the condition that the Rules must be previously published before they are made. This is the effect of section 133 (1). Sub-clause (2) of section 133 provides that all Rules made under this Act shall be published in the Official Gazette after they are made and shall unless some later date is appointed, come into force on the date of such publication. Clause (3) is important. It provides that all Rules made under the Act shall be laid for not less than fourteen days before the appropriate Legislature as soon as possible after they are made, and shall be subject to such modifications as the appropriate Legislature may make during the session in which they are so laid. So that if statutory Rules are made by the Government in exercise of legislative powers conferred on it by sections 67 and 68, they are subject to the control of the appropriate Legislature which can make changes or modification in the said Rules if it is thought necessary or expedient to do so. Publication before the Rules are made and publication after they are made also afford another statutory safeguard in that behalf. That is the nature of the legislative power conferred on the State Government.

Section 64-A confers judicial power on the State Transport Authority, because the said Authority is given revisional jurisdiction to deal with orders therein specified, subject to the limitations and conditions prescribed by the two Provisos to the said section. This is a clear provision conferring judicial power on the State Transport Authority.

1. (1957) S.C.R. 98 at 118: (1957) S.C.J. 236 : (1959) 2 M.L.J. (S.C.) 236: (1959) 2 An.W.R. 1957 M.L.J. (Cr.) 157.
2. (1959) 2 S.C.R. 227 : (1959) S.C.J. 1156 : 3. A.I.R. 1959 S.C. 896.

Along with the legislative and judicial powers which have thus been conferred, there is the administrative power conferred on the State Government by section 43-A. Section 43-A reads thus:

"The State Government may issue such orders and directions of a general character as it may consider necessary in respect of any matter relating to road transport to the State Transport Authority or Regional Transport Authority and such Transport Authority shall give effect to all such orders and directions."

It is the construction of this section which is the basis of the challenge to the validity of the impugned Rules in the present appeal. It may be conceded that there are some words in the section which are against the construction for which Mr. Kumara Mangalam contends. The words in respect of any matter relating to road transport are undoubtedly wide enough to take in not merely administrative matters but also matters which form the area of the exercise of quasi-judicial authority by the Tribunal constituted under the Act. *Prima facie*, there are no words of limitation in this clause and it would, therefore, be possible to take the view that these are matters which are scrutinised by the appropriate authorities in exercising their quasi-judicial jurisdiction. Similarly, the State Transport Authority and the Regional Transport Authority to which reference is made in this section are clothed not only with administrative power but also with quasi-judicial jurisdiction so that reference to the two authorities and reference to any matter relating to road transport would indicate that both administrative and quasi-judicial matters come within the sweep of section 43-A.

But there are several other considerations which support Mr. Kumara Mangalam's construction. The first is the setting at the context of the section. As we have already seen, this section has been introduced by the Legislature in response to the decision of the Madras High Court in *C.S.S. Motor Service case*¹ and that would indicate that the Madras Legislature intended to confer on the State Government power to issue administrative orders or directions of a general character. Besides, the two preceding sections, section 42, and section 43, and section 44 which follows support the argument that the field covered by section 43-A like that covered by sections 42, 43 and 44 is administrative and does not include the area which is the subject matter of the exercise of quasi-judicial authority by the relevant Tribunal.

Then again, the use of the words, orders and directions would not be appropriate in regard to matters which fall to be considered by authorities exercising quasi-judicial powers. These words would be appropriate if they have reference to executive matters.

And lastly, the provision that the relevant Transport Authority shall give effect to all orders and directions issued under section 43-A would be clearly inappropriate if the instructions issued under the said section are meant for the guidance of quasi-judicial bodies. If the direction is issued by the appropriate Government in exercise of its powers under section 43-A and it is intended for the guidance of a Tribunal discharging its quasi-judicial functions, it is hardly necessary to say that the Authority shall give effect to such directions. Section 43-A being valid, if the orders and directions of a general character having the force of law can be issued within the scope of the said section, then such orders or directions would by themselves be binding on the Transport Authorities for whose guidance they are made, and it would be superfluous to make a specific provision that they are so binding. On the other hand, if the orders and directions are in the nature of administrative orders and directions, they do not have the force of statutory Rules and cannot partake of the character of provisions of law, and so, it may not be inappropriate to provide that the said orders and directions shall be followed by the appropriate Tribunals. Therefore, it seems to us that on a fair and reasonable construction of section 43-A, it ought to be held that the said section authorises the State Government to issue orders and directions of a general character only in respect of administrative matters which fall to be dealt with by the State Transport Authority or Regional Transport Authority under the relevant provisions of the Act in their administrative capacity.

In reaching this conclusion, we have been influenced by certain other considerations which are both relevant and material. In interpreting section 43-A, we think, it would be legitimate to assume that the Legislature intended to respect the basic and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi-judicial function the Tribunal constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion conferred on a quasi-judicial tribunal is controlled by any such direction, that forges fetters on the exercise of quasi-judicial authority and the presence of such fetters would make the exercise of such authority completely inconsistent with the well-accepted notion of judicial process. It is true that law can regulate the exercise of judicial powers. It may indicate by specific provisions on what matters the tribunals constituted by it should adjudicate. It may by specific provisions lay down the principles which have to be followed by the Tribunals in dealing with the said matters. The scope of the jurisdiction of the Tribunals constituted by statute can well be regulated by the statute and principles for guidance of the said Tribunals may also be prescribed subject of course to the inevitable requirement that these provisions do not contravene the fundamental rights guaranteed by the Constitution. But what law and the provisions of law may legitimately do cannot be permitted to be done by administrative or executive orders. This position is so well established that we are reluctant to hold that in enacting section 43-A the Madras Legislature intended to confer power on the State Government to invade the domain of the exercise of judicial power. In fact, if such had been the intention of the Madras Legislature and had been the true effect of the provisions of section 43-A, section 43-A itself would amount to an unreasonable contravention of fundamental rights of citizens and may have to be struck down as unconstitutional. That is why the Madras High Court in dealing with the validity of section 43-A had expressly observed that what section 43-A purported to do was to clothe the Government with authority to issue directions of an administrative character and nothing more. It is somewhat unfortunate that though judicial decisions have always emphasised this aspect of the matter, occasion did not arise so long to consider the validity of the Government Order which on the construction suggested by the respondent would clearly invade the domain of quasi-judicial administration.

There is another consideration which is also important. If section 43-A authorises the State Government to issue directions or orders in that wide sense, section 68 would become redundant and safeguards so elaborately provided by section 133 while the State Government purports to exercise its authority under section 68 would be meaningless. If orders and directions can be issued by the State Government which are not distinguishable from statutory Rules, it is difficult to see why section 68 would have dealt with that topic separately and should have provided safeguards controlling the exercise of that power by section 133.

It is likewise significant that directions and orders issued under section 43-A are not required to be published nor are they required to be communicated to the parties whose claims are affected by them. Proceedings before the Tribunals which deal with the applications for permits are in the nature of quasi-judicial proceedings and it would indeed be very strange if the Tribunals are required to act upon executive orders or directions issued under section 43-A without conferring on the citizens a right to know what those orders are and to see that they are properly enforced. The very fact that these orders and directions have been consistently considered by judicial decisions as administrative or executive orders which do not confer any right on the citizens emphatically brings out the true position that these orders and directions are not statutory Rules and cannot therefore seek to fetter the exercise of quasi-judicial powers conferred on the Tribunals which deals with applications for permits and other cognate matters.

It is however, urged that the principles laid down in the impugned orders are sound principles and no challenge can be made to the validity of the order when it

is conceded that the order enunciates very healthy and sound principles. This order, it is argued, can be considered as expert opinion the assistance of which is afforded by the State Government to the Tribunals dealing with the question of granting permits. We are not impressed by this argument. It is not the function of the executive to assist quasi-judicial Tribunals by issuing directions in the exercise of its powers conferred under section 43-A. Besides, if section 43-A is valid and an order which is issued under it does not fall outside its purview, it would be open to the State Government to issue a direction and require the Tribunal to follow that direction unquestionably, in every case. It is true that in regard to the marking system evolved by the impugned rule liberty is left to the Tribunal not to adopt that system for reasons to be recorded by it. This liberty in practice may not mean much, but even theoretically if the impugned order is valid, nothing can prevent the State Government from issuing another order requiring that the marking system prescribed by it shall always be followed. We have already seen that section 43-A itself provides that effect shall be given to the orders issued under it, and so, if an order issued under section 43-A itself were to prescribe that it shall be followed it will have to be followed by the Tribunal and no exception can be made in that behalf. Therefore, we cannot accept the argument strongly pressed before us by Mr. Ganapathy Iyer on behalf of respondent No. 1 that the validity of the order cannot be challenged on the ground that the principles laid down by it are sound and healthy. We have therefore come to the conclusion that the impugned order is outside the purview of section 43-A inasmuch as it purports to give directions in respect of matters which have been entrusted to the Tribunals constituted under the Act and which have to be dealt with by these Tribunals in a quasi-judicial manner. We cannot overlook the fact that the validity of the Act particularly in reference to its provisions prescribing the grant and refusal of permits, has been sustained substantially because this important function has been left to the decision of the Tribunals constituted by the Act and these Tribunals are required to function fairly and objectively with a view to exercise their powers quasi-judicially, and so, any attempt to trespass on the jurisdiction of these Tribunals must be held to be outside the purview of section 43-A.

We are conscious of the fact that the impugned order was issued after and presumably in response to the decision of the Madras High Court in the case of *C. S. S. Motor Service*¹, though it would appear that what the High Court had suggested was presumably the making of the Rules under section 68 of the Act. It cannot also be disputed that the main object of the State Government in issuing this order was to avoid vagaries, and introduce an element of certainty and objectivity, in the decision of rival claims made by applicants in respect of their applications for permits. It may have been thought by the State Government that if the Tribunals are allowed to exercise their discretion without any guidance, it may lead to inconsistent decisions in different areas and that may create dissatisfaction in the public mind. It does appear, however, that in some other States the problem of granting permits has been resolved without recourse to the marking system. But apart from that, even if it be assumed that the marking system, if properly applied, may make the decisions in regard to the grant of permits more objective, fair and consistent, we do not see how that consideration can assist the decision of the problem raised before us. If the State Government thinks that the application of some kind of marking system is essential for a fair administration of the Act, it may adopt such course as may be permissible under the law. Section 47 (1) (a) requires *inter alia* that the interests of the public generally have to be borne in mind by the Regional Transport Authority in considering applications for stage carriage permits. The said section refers to other matters which have to be borne in mind. It is unnecessary to indicate them for our present purposes. The Legislature may amend section 47 by indicating additional considerations which the Transport Authority may have to bear in mind, or the Legislature may amend section 47 by conferring on the State Government expressly and specifically a power to make Rules in that behalf or the State Government may

proceed to make Rules under section 68 without amending section 47. These are all possible steps which may be taken if it is thought that some directions in the nature of the provisions made by the impugned order must be issued. That, however, is a matter with which we are not concerned and on which we wish to express no opinion. As this Court has often emphasised, in constitutional matters it is of utmost importance that the Court should not make any obiter observations on points not directly raised before it for its decision. Therefore, in indicating the possible alternatives which may be adopted if the State Government thinks that the marking system helps the administration of the Act, we should not be taken to have expressed any opinion on the validity of any of the courses specified.

That leaves only one point to be considered. Mr. Ganapathy Iyer urged that even though the impugned order may be invalid, that is no reason why the order passed by the Appellate Tribunal which has been confirmed by the High Court in the present writ proceedings should be reversed. He argues that what the Appellate Tribunal has done is to act upon the principles which are sound and the fact that these principles have been enunciated by an invalid order should not nullify the decision of the Appellate Tribunal itself. Thus presented, the argument is no doubt plausible; but a closer examination of the argument reveals the fallacy underlying it. If the Appellate Transport Authority had considered these matters on its own without the compulsive force of the impugned order, it would have been another matter; but the order pronounced by the Appellate Authority clearly and unambiguously indicates that it held and in a sense rightly, that it was bound to follow the impugned order unless in the exercise of its option it decided to depart from it and was prepared to record its reasons for adopting that course. It would, we think, be idle, to suggest that any Transport Authority functioning in the State would normally refuse to comply with the order issued by the State Government itself. Therefore, we have no hesitation in holding that the decision of the Appellate Tribunal is based solely on the provisions of the impugned order and since the said order is invalid, the decision itself must be corrected by the issue of a writ of *certiorari*.

In the result, we allow the appeal, set aside the order passed by the High Court in Writ Petition No. 692 of 1959 and direct that the said Writ Petition be allowed. There would be no order as to costs throughout. In accordance with this decision a writ of *certiorari* shall be issued setting aside the order passed by the Appellate Tribunal and remanding the matter to the State Transport Authority for disposal in accordance with law.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, *Chief Justice*, K.N. WANCHOO, J.C. SHAH N. RAJAGOPALA AYYANGAR, AND S.M. SIKRI, JJ.

Mithoo Shahani and others

.. *Appellants**

v.

The Union of India and others

.. *Respondents.*

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954), section 24—Order making allotment set aside—Effect on title which was obtained under sanad.

Where an order making an allotment was set aside the title which was obtained on the basis of the continuance of the order also fell with it. *Balwant Kanu v. Chief Settlement Commissioner (Lands)*, I.L.R. 1964 Punj. 36 (F.B.), approved; *Partimal v. Managing Officer, Jaipur*, I.L.R. 11 Raj. 1121 (F.B.), overruled. A *sanad* can be lawfully issued only on the basis of a valid order of allotment. If an order of allotment which is the basis upon which a grant is made is set aside it would follow, and the conclusion is inescapable that the grant cannot survive, because in order that that grant should be valid it should have been effected by a competent officer under a valid order.

Appeal by Special Leave from the Order dated 28th April, 1960, of the Deputy Secretary to the Government of India, Ministry of Rehabilitation, New Delhi,

purporting to exercise the power of Revision under section 33 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 in Case No 38 (894)/59 Neg A

Achhru Ram Senior Advocate (*N N Keswani*, Advocate, with him), for Appellants and Petitioners

N S Bindra, Senior Advocate, (*B R G K Achar*, Advocate, with him), for Respondents Nos 1 and 2 (In both the Appeal and Petition)

M C Setalvad, Senior Advocate, (*K Jiram* and *R Ganapathy Iyer*, Advocates with him), for Respondents Nos 3 to 7 (In both the Appeal and Petition)

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J—The appeal by Special Leave is directed to question the correctness of an order passed by the Deputy Secretary to the Government of India Ministry of Rehabilitation under section 33 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (Central Act XLIV of 1954) which for convenience will be referred to hereafter as the Act

The facts necessary to appreciate the point urged before us are briefly these. The property in dispute is agricultural land of an extent of about 60 acres situated at Nizamabad in the former State of Hyderabad and now in the State of Andhra Pradesh. On 7th September, 1950, the Deputy Custodian of Nizamabad District allotted 44 acres of this land to five persons who are the respondents before us. All these five were displaced persons and were entitled to this allotment. By a further order dated 21st July, 1951, the balance of the 16 acres and odd was also allotted to them. The allotment was by way of lease and one of its stipulations was that the terms of the lease would be revised only after five years. The only point that needs to be stated about the terms of this lease is, that there was no condition imposed upon the lessees that they should cultivate the lands personally. While the lease was continuing in force, the Government of India issued a press note on 13th November, 1953, by which they announced that they had decided to allot evacuee agricultural land in Hyderabad State to displaced persons whose claims for agricultural lands had been verified under the Displaced Persons (Claims) Act, 1950. It further stated that the allotments would be towards the settlement of claims in respect of their agricultural lands. The allotment was to be on the same terms as under the quasi permanent allotment scheme in the Punjab and applications for allotment were invited from persons residing *inter alia* in Hyderabad State whose verified claims included a claim for agricultural lands. The press note prescribed the 31st of December as the last date for the receipt of these applications. The appellants made an application in pursuance of this notification and on 4th May, 1954, the land now in dispute, though under a subsisting lease in favour of the respondents, was allotted to them on quasi permanent tenure. It is not disputed that the appellants satisfied the qualifications for making applications under the press note and for being allotted evacuee property thereunder. The order of allotment, a copy of which was forwarded to the Collector of Nizamabad District contained a request that the allottees may be put in possession of the land and the fact intimated to the office of the Regional Settlement Commissioner. The Revenue Authorities acting on this request or direction dispossessed the respondents from the lands leased to them and put the appellants in possession thereof.

Thereafter, the respondents made a representation to the Regional Settlement Commissioner, Bombay pointing out that they were displaced persons who having been rehabilitated by the allotment by way of lease were now being uprooted. They also pointed out that they had incurred large expenses in improving the land and bringing it into proper cultivation. These applications were considered by the Regional Settlement Commissioner who by his order dated 10th July, 1954, rejected their application. It is not necessary to set out the reasons for making this order except to say that one of them was the failure on the part of the lessees to personally cultivate the lands. The respondents then, moved the Regional Settlement Commissioner requesting him to review his order and they also sought relief from the Government of India seeking intervention in their favour.

Subsequent to this date the Act was enacted and it came into force on 9th October, 1954. Section 12 of the Act empowered the Central Government to acquire evacuee property for rehabilitation of displaced persons and in pursuance thereof the properties now in dispute were acquired by Government by a notification dated 18th January, 1955. During the pendency of the proceedings by which the respondents sought to obtain a reversal of the order dated 10th July, 1954, and without reference to them, the Regional Settlement Commissioner issued sanads in favour of appellants 1 to 4 on 12th January, 1956, acting under section 20 of the Act.

The Deputy Chief Settlement Commissioner who dealt with the representations made by the respondents passed an order on 22nd August, 1958, after obtaining a report from the Regional Settlement Commissioner. He pointed out in his order that there was no indication from the papers on the file that the land was originally leased to the respondents on condition that they should cultivate the lands personally. He therefore set aside the order of the Regional Settlement Commissioner dated 10th July, 1954, and remanded it for further enquiry directing the passing of fresh orders after a thorough enquiry. Thereafter a report was called for and obtained from the Collector who conducted this enquiry and in his report dated 13th June, 1959, he recorded a finding that there had been personal cultivation of the lands by the respondents. He pointed out that of the 60 acres comprising the entire extent 26 guntas were allotted on a quasi-permanent basis to other displaced persons in 1954 and this extent was therefore out of the controversy. It ought to be mentioned that the order of the Deputy Chief Settlement Commissioner which was of the date 22nd August, 1958, was apparently by inadvertence passed without notice to the appellants. When this was brought to his notice after the remand he issued notice to them and after hearing them, referred the case to the Government of India for action under section 33 of the Act. The matter was considered by the Deputy Secretary in the Rehabilitation Ministry who heard all the parties and recorded the following findings: (1) that the order dated 10th July, 1954, refusing to transfer the lands to the respondents was wrong, and (2) that there was no justification for terminating the lease and depriving the respondents of possession of the property now in dispute and on these findings directed the sanads granted to the appellants to be revoked and the respondents be put in possession of the property. It is the legality of this order that is challenged in this appeal.

Three points were urged by Mr. Achhru Ram, learned Counsel for the appellants: (1) That the Central Government had no power under section 33 of the Act to revise the order of the Regional Settlement Commissioner dated 10th July, 1954, (2) that even assuming that that order was capable of revision, the land in dispute had been transferred to the appellants irrevocably by way of quasi-permanent allotment and sanads issued and that thereafter the title under the sanads which had been granted in the name of the President of India could not be disturbed except in accordance with the terms of the sanads, (3) that the Deputy Secretary in the Government of India had no materials before him on the basis of which he could find that the order dated 10th July, 1954, was erroneous and required to be revised.

We shall deal with these points in the same order. Section 33 under which the order under appeal was made reads:

"The Central Government may at any time, call for the record of any proceeding under this Act and may pass such order in relation thereto as in its opinion the circumstances of the case require and as is not inconsistent with any of the provisions contained in this Act or the Rules made thereunder."

In considering the argument addressed to us under this head there are two points to be borne in mind. If the order dated 10th July, 1954, passed by the Regional Settlement Commissioner was "a proceeding under this Act" then obviously there is no limitation on the power of the Central Government to pass "such order as in the circumstances of the case was required." Of course, the Central Government cannot pass an order which is inconsistent with any of the provisions contained in the Act or the Rules made thereunder and subject to the objection made that after the transfer of property and the grant of a sanad under section 20 of the Act read with rule 91 (8) in the form specified in Appendix XXIV to the Rules which is the

second point raised by learned Counsel, it was not suggested that the order now impugned was inconsistent with any of the provisions of the Act or the Rules made thereunder. Whether the opinion which the Central Government entertained was correct or incorrect on the evidence would, of course, not fall for consideration by this Court in an appeal under Article 136 but as regards the contention that the order is illegal or invalid as distinct for its being incorrect, we shall deal with it in considering the last of the arguments submitted to us by learned Counsel.

It was urged that the order of the Regional Settlement Commissioner which the Central Government revised under section 33 was not "a proceeding under the Act" having been passed before the Act came into force and was therefore *outside its jurisdiction under section 33 of the Act*. The answer to this is, however, furnished by section 39 of the Act. That section deals with orders passed prior to the commencement of the Act and renders "all things done" or "action taken" in the exercise of powers conferred by or under this Act as if the Act were in force on the date when such thing was done or action taken. Section 39 enacts

"Anything done or any action taken (including any order made) by the Chief Settlement Commissioner, Settlement Commissioner, Additional Settlement Commissioners or Settlement Officers for the purposes of payment of compensation or rehabilitation grants or other grants to displaced persons shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the date on which such thing was done or action was taken."

It was then suggested that since the order dated 10th July, 1954, had merely rejected an application filed by the respondents for restoring them to possession of lands from which they complained they had been unjustly dispossessed, it was not "a thing done" or "action taken for the purpose of payment of compensation or rehabilitation grants to displaced persons" so as to be deemed to be taken under the provisions of this Act. The same point was urged in a slightly different form by saying that even if the Central Government could interfere and set aside the order of the Regional Settlement Commissioner dated 10th July, 1954, still they could not direct the cancellation of the sales and grants of sanads to the appellants and that as this was not a matter pending before them, the order in so far as it directed the cancellation of the sanads and the dispossession of the appellants from the disputed property was without jurisdiction. We do not see any substance in the points stated in either form. In the first place even if learned Counsel is right in submitting that the Central Government should have stopped with setting aside the order dated 10th July, 1954, the result would have been the same, because the prayer which was rejected by the Regional Settlement Commissioner when he passed that order was that contained in an application by the respondents that they should be restored to the possession of the lands from which they had been dispossessed. If that prayer had to be granted on the reversal of the order dated 10th July, 1954, it would inevitably have meant that the appellants should have been deprived of possession which is exactly what the order now impugned has directed. As the dispossession of the appellants was consequential on the setting aside of the order dated 10th July, 1954 the appellants do not obtain any advantage by raising the contention that the Central Government should have confined itself to setting aside that order and doing nothing more. Besides, this submission proceeds from not appreciating the matters that were the subject of consideration before the Central Government and were considered by them at the time when the impugned order was passed. The facts were that there had been an allotment by way of the lease as a rehabilitation grant to persons who were admittedly displaced persons in 1950-51. It was "this thing done" that had been upset in 1954 and which was restored by the order of July, 1954, being set aside by the order under section 33 of the Act. In substance and effect therefore the impugned order was dealing with and rectifying an error committed in relation to a "thing done or action taken" with respect to a rehabilitation grant to a displaced person. Not merely the order dated 10th July, 1954, but the entire question as to whether the respondents as original allottees by way of lease were entitled to the relief of restoration was referred to the Central Government by reason of the order of the Regional Settlement Commissioner dated 3rd November, 1959. Both the parties were heard on all the points by the Central

Government before the orders were passed and it would not therefore be right to consider that the matter in issue before the Central Government was technically merely the correctness of the order of the Regional Settlement Commissioner dated 10th July, 1954, which read *in vacuo* might not be comprehended within section 39.

The next point that was urged was that the appellants had been granted sanads on 12th January, 1956, and that their sanads could not be cancelled and the title acquired thereunder displaced except in accordance with the terms of the sanads. The term of the sanad which is relevant and which was referred to as the sole ground on which it could be set aside and the title of the appellants displaced reads :

"It shall be lawful for the President to resume the whole or any part of the said property if the Central Government is, at any time, satisfied and records a decision in writing to that effect (the decision of the Central Government in this behalf being final) that the transferee or his predecessor-in-interest had obtained or obtains any other compensation in any form whatsoever under the said Act by fraud or misrepresentation."

It is not disputed that this condition has not been fulfilled but the question, however, is whether when the order of allotment on the basis of which the property was granted to the appellant and the sanad issued, is itself reversed or set aside can the sanad and the title obtained thereunder survive? On this point there are two decisions to which our attention was invited—the first is a decision of the High Court of Rajasthan in *Partumal v. Managing Officer, Jaipur*¹, being a decision of a Full Bench of that Court. That case was concerned with the construction of section 24 of the Act which deals with the power of the Chief Settlement Commissioner to revise orders passed by a Settlement Officer, Assistant Settlement Officer, Assistant Settlement Commissioner, Additional Settlement Commissioner etc., The relevant part of the head-note brings out the point of the decision. It reads :

"Section 24 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, no doubt confers very wide powers of revision on the Chief Settlement Commissioner, but it does not authorise cancellation of sales after they are completed. No doubt allotment can be set aside under section 24 of the Act, but after such allotments ripen into sales, they cannot be cancelled. The Chief Settlement Commissioner or the Settlement Commissioner exercising his powers has no authority to cancel sale of property and an order of cancellation of sale of property is without jurisdiction and invalid. It would be too much to read in section 24 of the Act to hold that it extends to cancellation of sales by expressly providing for cancellation of allotments. The execution of a sale deed cannot be regarded as only a formal expression of an order of allotment dependent on its subsistence."

Subsequent to this decision a case arose before the High Court of Punjab : *Balwant Kaur v. Chief Settlement Commissioner (Lands)*², and a Full Bench of that Court by a majority dissented from this view and held that where an order making an allotment was set aside the title which was obtained on the basis of the continuance of that order also fell with it. We are clearly of the opinion that the judgment of the Punjab High Court is correct. The relevant provisions of the Act and the Rules have all been set out in the decision of the Punjab High Court and we do not consider it necessary to refer to them in any detail. It is sufficient to say that they do not contain any provision which militates against the position which is consistent with principle and logic. It is manifest that a sanad can be lawfully issued only on the basis of a valid order of allotment. If an order of allotment which is the basis upon which a grant is made is set aside it would follow, and the conclusion is inescapable that the grant cannot survive, because in order that that grant should be valid it should have been effected by a competent officer under a valid order. If the validity of that order is effectively put an end to it would be impossible to maintain unless there were any express provision in the Act or in the Rules that the grant still stands. It was not suggested that there was any provision in the Act or in the Rules which deprives the order setting aside an order of allotment of this effect. We do not therefore consider that there is any substance in the second point urged by learned Counsel.

The last of the points urged was that the Deputy Secretary who passed the impugned order had no materials upon which he could find that the order dated 10th July, 1954, was erroneous or justified being set aside. Learned Counsel is

1. I.L.R. 11 Raj. 1121 (F.B.).

2. I.L.R. (1964) Punjab 36 (F.B.).

not right in this submission because if the respondents were entitled to remain in possession of the property originally leased to them by way of allotment and their leasehold interest had not been validly terminated—a fact which on the materials the Deputy Secretary was competent to find—the order that he passed restoring them to possession could not be said to lack material. We consider therefore that there is no merit in this submission.

The result is that the appeal fails and is dismissed with costs.

Writ Petition No. 108 of 1960

This petition under Article 32 of the Constitution has been filed by the appellant in Civil Appeal 552 of 1963 and seeks the issue of a writ of *certiorari* to quash the same order of the Deputy Secretary to the Union Government as that whose legality is challenged in the appeal. Both the Writ Petition as well as the application for Special Leave came on for preliminary hearing on 30th November, 1960, and while the leave prayed for was granted, rule nisi was also issued in the petition and the two matters have been heard together. In view of our decision in the appeal, the Writ Petition will stand dismissed, but there will be no order as to costs.

K S

Appeal and Petition dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO, J C SHAH, N RAJAGOPALA AYYANGAR AND S M SIKRI, JJ

Bihari Lal Batra

*Appellant**

v

The Chief Settlement Commissioner, (Rural) Punjab,
Chandigarh and others

Respondents

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1948), section 24—Order making allotment set aside—Effect on title under sanad—Rules—Rule 2 (h)—If discriminatory

Where an order making an allotment was set aside the title which was obtained on the basis of the continuance of the order also fell with it.

Rule 2 (h) of the Displaced Persons Compensation and Rehabilitation Rules 1955 cannot be said to be discriminatory. No rule which seeks to change the law can be held invalid for the mere reason that it effects an alteration in the law. It cannot be said that a rule which operates prospectively is invalid because thereby a difference is made between the past and the future.

Appeal from the Judgment and Order dated 26th November, 1959 of the Punjab High Court in Civil Writ No. 678 of 1957.

Bishan Narain, Senior Advocate, (N A Keswani, Advocate, with him) for Appellant.

B K Khanna and *B R G A Achar*, Advocates, for Respondents Nos. 1 to 3.

D N Mukherjee, Advocate, for Respondent No. 4.

R V S Mani and *T R V Sastri*, Advocates, for Respondent No. 5.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J —This is an appeal on a certificate of fitness granted under Article 133 by the High Court of Punjab against the order of that Court dismissing the appellant's petition to it under Article 226 of the Constitution.

The point in controversy lies within a narrow compass and hence of the voluminous facts we propose to set out only those which are relevant for appreciating the contentions urged before us. The father of the appellant owned a considerable agricultural property in Pakistan and he with the members of his family moved over to India on partition. The appellant's father was allotted a considerable extent

of land in village Kharar, District Ambala, but we are not concerned with that. He had still some unsatisfied claim for allotment and on 29th December, 1955, he was allotted by the Managing Officer on quasi-permanent tenure Khasra Nos. 880, 881 and 882 which were within the municipal area of Kharar with the regularity of which allotment alone this appeal is concerned. It may be mentioned that the appellant's father had died in 1952, and the allotment made was actually to the appellant in lieu of the claim of his father. On the allotment being made, a sanad was issued to the appellant on 31st December, 1955 by the Managing Officer. When the appellant tried to take possession of these lands, disputes were raised by respondents Nos. 4 and 5. They were not displaced persons but they claimed that they had been in possession of this property from a long anterior date from which they could not be disturbed and also that the property could not be the subject of a valid allotment. These respondents moved the Assistant Settlement Commissioner for cancellation of the allotment and this appeal was allowed by the Officer who found that the land comprised in these three khasra numbers were within an "urban area" within the meaning of rule 2 (h) of the Displaced Persons Compensation and Rehabilitation Rules, 1955, and consequently that the allotment to the appellant was contrary to law. He therefore cancelled the allotment. The appellant thereafter applied to the Chief Settlement Commissioner in revision and not being successful there moved the High Court by a petition under Articles 226 and 227 of the Constitution. As stated earlier, this petition was dismissed and it is the correctness of this dismissal that is challenged in the appeal before us.

Mr. Bishan Narain, learned Counsel for the appellant urged in the main two contentions in support of the appeal. The first was (1) that after the Managing Officer granted a sanad on 31st December, 1955, in the name of the President of India, the appellant obtained an indefeasible title to the property and that this title could not be displaced except on grounds contained in the sanad itself even in the event of the order of allotment being set aside on appeal or revision. We have considered this point in the judgment in Civil Appeal No. 552 of 1963 (*Shri Mithoo Shahani and others v. The Union of India and others*¹, which was pronounced on 10th March, 1964, and for the reasons there stated this submission has to be rejected.

The second point that he urged was, and this was in fact the main contention raised before the High Court, that rule 2 (h) of the Displaced Persons Compensation and Rehabilitation Rules 1955 was unconstitutional as contravening Article 14 of the Constitution and so the original allotment to the appellant must be held to be lawful. We consider that there is no substance in this argument. In fact we are unable to appreciate the ground on which the contention is being urged. Section 40 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 enables the Central Government by Notification in the Official Gazette to make Rules to carry out the purposes of the Act, and in particular on an elaborately enumerated list of matters. It was not suggested that the Rules of 1955 were not competently made under section 40. These Rules were published on 21st May, 1955, when they came into force. Rule 2 (h) the validity of which is impugned in these proceedings is a rule containing the definitions.

Rule 2 (h) reads, to extract what is material :

" 2. In these Rules, unless the context otherwise requires—

(a) to (g)

(h) 'urban area' means any area within the limits of a corporation, a municipal committee, a notified area committee, a town area committee, a small town committee, a cantonment or any other area notified as such by the Central Government from time to time :

Provided that in the case of the quasi-permanent allotment of rural agricultural lands already made in the States of Punjab and Patiala and East Punjab States Union, the limits of an urban area shall be as they existed on the 15th August, 1947."

The words 'of rural agricultural lands' occurring in the Proviso to this rule were replaced by an amending Notification of 1957 by the words 'in rural area', but

1. Reported in (1964) 2 S.C.J. 579.

this amendment is obviously of no significance "Rural area" is defined by rule 2 (f) to mean 'any area which is not an urban area'

Pausing here, it would be useful to state two matters which are not in dispute (1) that the allotment to the appellant was made on 29th December, 1955, the said being issued two days later. It was therefore an allotment which was made after 21st May, 1955 when the rules came into force, (2) the other matter is that Khasra Nos 880, 881 and 882 were included in urban limits on 10th February, 1951, by the municipal area of Kharar being extended to cover these plots. It would therefore be obvious that on the date when the allotment was made, the allotted land was in an "urban area" and therefore it could not have been validly allotted.

We must confess our inability to comprehend what precisely was the discrimination which the rule enacted which rendered it unconstitutional as violative of Article 14. So far as we could understand the submission, the unreasonable discrimination was said to exist because of the operation of the Proviso. Under the Proviso in regard to quasi permanent allotments 'already made', made before 21st May, 1955 in the States of Punjab and Pepsu, the test of what was to be considered an "urban area" was to be determined on the basis of the state of circumstances which obtained on 15th August, 1947. The allotment in favour of the appellant was after the Rules came into force and was not one "already made". Therefore if on the date of the allotment the land was in an urban area, the allotment would be governed by the main Para of the definition and so could not have been validly made and that was the reason why it was set aside. The discrimination is said to consist in the rule having drawn a dividing line at the date when it came into force, for determining whether the allotment was valid or not. It is the discrimination that is said to be involved in this prospective operation of the rule that we find it difficult to appreciate. It is possible that before the Rules were framed the land now in dispute could have been allotted, but because of this it is not possible to suggest that the rule altering the law in this respect which *ex concessis* is within the rule making power under the Act, is invalid. Such a contention is patently self contradictory. Every law must have a beginning or time from which it operates, and no rule which seeks to change the law can be held invalid for the mere reason that it effects an alteration in the law. It is sometimes possible to plead injustice in a rule which is made to operate with retrospective effect, but to say that a rule which operates prospectively is invalid because thereby a difference is made between the past and the future, is one which we are unable to follow.

There are no merits in this appeal which fails and is dismissed with costs

K S

Appeal dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SILLON, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ

The State of Rajasthan

*Appellant**

v

Mukan Chand and others

Respondents

Rajasthan Jagurdar's Debt Redemption Act (IX of 1957) sections 2 (e) and 7 (2)—Validity—If contrary to Articles 14, 19 and 31 of the Constitution of India (1950)

Section 2 (e), clauses (i) to (vi) of the Rajasthan Jagurdar's Debt Redemption Act (IX of 1957) including debts mentioned in the definition of debt infringe Article 14 of the Constitution of India. The fact that debts are owed to a government or local authority or other bodies mentioned in the impugned part of section 2 (e) has no rational relationship with the object sought to be achieved by the Act. Further, no intelligible principle underlies the exempted categories of debts. No reasonable classification is disclosed for the purpose of sustaining the impugned part of section 2 (e).

Section 7 (2) confirming the creditors right to proceed only against the compensation and rehabilitation grant is valid as it imposes reasonable restriction, in the interests of general public, on

the right of a secured creditor. A secured creditor, when he advanced money on the security of *jagir* property, primarily looked to that property for the realisation of his dues. Further this sub-section has been designed with the object of rehabilitating a *jagirdar* whose *jagir* properties have been taken over by the State for a public purpose at a low valuation.

Appeal from the Judgment and Order dated 18th February, 1959, of the Rajasthan High Court in Civil Misc. Case No. 10 of 1959.

S. K. Kapur, Senior Advocate, (*B. R. G. K. Achar*, Advocate, with him), for Appellant. No appearance for Respondent No.

The Judgment of the Court was delivered by

Sikri, J.—This is an appeal directed against the judgment of the Rajasthan High Court, which granted a certificate under Article 133 (1) (c).

One Mukan Chand, respondent No. 1 in this appeal (hereinafter referred to as the decree-holder) obtained a mortgage decree on 12th February, 1954, for Rs. 1,14,581-14-6, with future interest at 6 per cent per annum, against one Rao Raja Inder Singh (hereinafter referred to as the judgment-debtor). The mortgage money was advanced under three mortgages, and the mortgaged properties consisted of 2 *jagirs* and some *non-jagir* immovable property. The latter property was sold in execution and Rs. 33,750 paid to the decree-holder in partial satisfaction of the decree. On 14th December, 1956, the decree-holder filed an execution petition in the Court of the District Judge, Jodhpur, for Rs. 99,965-3-6, praying for attachment of the amount of compensation and rehabilitation grant which would be paid to the judgment-debtor on account of resumption of his *jagir*. This case was registered as Execution Case No. 12/57. On 29th July, 1957, the judgment-debtor made an application before the District Judge, Jodhpur, to the effect that the decretal amount should be reduced in accordance with section 5 of the Rajasthan Jagirdar's Debt Reduction Act (Rajasthan Act IX of 1957). On 31st July, 1957, the judgment-debtor submitted another application claiming that only half of his total *jagir* compensation and rehabilitation grant money was liable to attachment under section 7 of the said Act. The decree-holder, in his reply to those petitions, urged that the provisions relied on where *ultra vires* the Constitution of India, being in contravention of Articles 14, 19 and 31 of the Constitution.

On 3rd December, 1957, the decree-holder filed a petition under Article 228 of the Constitution, praying that the Execution Case No. 12 of 1957 pending in the Court of the District Judge, Jodhpur, be withdrawn from that Court to the Rajasthan High Court. The High Court transferred the case to its file, and thereafter issued notice to the State of Rajasthan, as the constitutionality of the said Act had been challenged. By its judgment, the High Court held that apart from the latter part of section 2 (e) excluding certain debts—hereinafter referred to as the impugned part—and section 7 (2) of the Act, the rest of the Act was valid. The State applied for leave to appeal to the Supreme Court, and so did the decree-holder. On the certificates being granted, two appeals were filed in this Court. The appeal of Mukan Chand (Civil Appeal No. 508/61) was, by order dated 23rd April, 1962, of this Court, held to have abated. Therefore, we are not concerned with the validity of the other provisions of the Act.

Although the validity of the other provisions is not now in question, it is necessary to set out the relevant provisions of the Act, because they have a bearing on the question of the validity of the impugned part of section 2 (e) and section 7 (2) of the Act; and these are reproduced below :

"Preamble.—To provide for the scaling down of debts of jagirdars whose *jagir* lands have been resumed under the provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952.

Section. 2 (e) "debt" means an advance in cash or in kind and includes any transaction which is in substance a debt but does not include an advance as aforesaid made on or after the first day of January, 1949 or a debt due to :—

- (i) the Central Government or Government of any State ;
- (ii) a Local Authority ;
- (iii) a Scheduled Bank ;

- (iv) a Co-operative Society,
- (v) a waqf, trust or endowment for a charitable or religious purpose only, or
- (vi) a person, where the debt was advanced on his behalf by the Court of Wards

Section 3 Reduction of secured debt at the time of passing of decree—(1) Notwithstanding anything in any law agreement or document, in any suit to which this Act applies relating to a secured debt, the Court shall after the amount due has been ascertained, but before passing a decree, proceed as hereinafter stated

(2) (a) Where the mortgaged property consists exclusively of jagir lands and such lands have been resumed under the provisions of the Act, the Court shall first ascertain whether the mortgagor had the right under the jagir law in force at the time the mortgage-deed was executed to mortgage the jagir lands, or failing that, whether specific permission for effecting the mortgage was obtained from the competent authority, and whether the mortgage was validly subsisting on the date of resumption of the jagir lands.

(b) if the mortgage was legally and properly made and was validly subsisting on the aforesaid date the Court shall reduce the amount due in accordance with the formula given in Schedule I

(3) Where the mortgaged property consists partly of jagir lands as aforesaid and partly of property other than such lands, the Court shall after taking action in accordance with the provisions of sub-clause (a) of sub-section (2), proceed to distribute the amount due on the two properties separately in accordance with the principles contained in section 82 of the Transfer of Property Act, 1882 (IV of 1882) as if they had been properties belonging separately to two persons with separate and distinct rights of ownership, and after the amount due has been so distributed, reduce the amount due on the jagir lands in accordance with the formula given in Schedule I

Section 4—Powers to reduce secured debt after passing of decree—(1) Notwithstanding anything in the Code of Civil Procedure, 1908 (V of 1908) or any other law, the Court which passed a decree to which the Act applies relating to a secured debt shall, on the application either of the decree-holder or judgment debtor, proceed as hereinafter stated.

(2) Where the mortgaged property charged under the decree consists exclusively of jagir lands and such lands have been resumed under the provisions of the Act, the Court shall reduce the amount due in accordance with the formula given in Schedule I

(3) Where the mortgaged property charged under the decree consists partly of jagir lands and partly of property other than jagir lands, the Court shall determine the amount due on the first day of January, 1949, and distribute the same on the two properties separately in accordance with the principles contained in section 82 of the Transfer of Property Act, 1882 (IV of 1882), as if they had been properties belonging to two persons with separate and distinct rights of ownership and after the amount due as respect the jagir lands has been so calculated, reduce it in accordance with the formula given in Schedule I

Section 6—Satisfaction of the decree—After the amount due has been reduced under and in accordance with the provisions of section 4 the decree shall, to the extent of the reduction so effected be deemed, for all purposes and on all occasions to have been duly satisfied.

Section 7 (2)—Notwithstanding anything in any law, the reduced amount found in the case of a mortgagor or judgment-debtor as the case may be under section 3 or section 4 as respects mortgaged jagir lands shall not be legally recoverable otherwise than out of the compensation and rehabilitation grant payable to such mortgagor or judgment debtor in respect of such jagir lands

We may mention that respondent No. 1 has not entered appearance in this Court. The learned Counsel for the State, Mr. S. K. Kapur, has urged that the High Court erred in holding that these two provisions, i.e., impugned part of section 2 (e) and section 7 (2), were void. Regarding the impugned part of section 2 (e), he contended that the debts mentioned in sub-clauses (i) to (vi) of section 2 (e) have been placed on a different footing from debts due to other creditors, because the bodies and the authorities mentioned therein serve a public purpose or a public cause. He urged that this provided a reasonable basis for differentiating between private creditors and creditors mentioned in clauses (i) to (vi) above. Regarding section 7 (2), he urged that it imposed reasonable restrictions, in the interest of general public, on the creditors.

Before examining the validity of the impugned provisions, it is necessary to examine the scheme of the Act. As the Preamble states in plain terms, the object of the Act is to scale down debts of jagirdars whose jagir lands have been resumed under the provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act. Clause (e) of section 2 defines 'debt' to mean an advance in cash or in kind. The definition does not embrace dues of Government or a local authority in respect of taxes, land revenue, etc. The definition then excludes from the purview of the Act debts due to Central Government and other authorities and bodies mentioned in the clause. We shall advert to them later when discussing the validity of this exclusion.

Section 3 provides for reduction of secured debts in accordance with the formula given in Schedule I at the time of passing a decree, and their apportionment where necessary, between *jagir* and *non-jagir* property. Section 4 provides for reduction of secured debts after a decree has been passed. Section 5 directs a Court to pass a fresh decree after reduction of the secured debts. Section 6 provides that after reduction of the secured debt in accordance with the provisions of section 4, the decree shall, to the extent of the reduction so effected, be deemed for all purposes and on all occasions to have been duly satisfied. Clause (1) of section 7 provides for the execution of the decree against the compensation and rehabilitation grant payable in respect of the *jagir* lands of the judgment-debtor. Clause (2) of section 7, which has been struck down by the High Court, prohibits the recovery of the reduced amount with respect to *jagir* property from any property other than the compensation and rehabilitation grant payable to a *jagirdar*. The effect of this provision is that the other properties of the *jagirdar*, existing or which he may acquire hereafter, are immune from being proceeded against in execution or otherwise.

We think that the High Court was right in holding that the impugned part of section 2 (e) infringes Article 14 of the Constitution. It is now well-settled that in order to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentiation which distinguishes persons or things that are to be put together from others left out of the group, and (2) that the differentia must have a rational relationship to the object sought to be achieved by the statute in question. In our opinion, condition No. 2 above has clearly not been satisfied in this case. The object sought to be achieved by the impugned Act was to reduce the debts secured on *jagir* lands which had been resumed under the provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act. The Jagirdar's capacity to pay debts had been reduced by the resumption of his lands and the object of the Act was to ameliorate his condition. The fact that the debts are owed to a Government or local authority or other bodies mentioned in the impugned part of section 2 (e) has no rational relationship with the object sought to be achieved by the Act. Further, no intelligible principle underlies the exempted categories of debts. The reason why a debt advanced on behalf of a person by the Court of Wards is clubbed with a debt due to a State or a scheduled bank and why a debt due to a non-scheduled bank is not excluded from the purview of the Act is not discernible.

In this connection, Mr. Kapur has relied on the decision of this Court in *Manna Lal v. Collector of Jhalwar*¹. This case is clearly distinguishable because there a law giving special facility for the recovery of dues to a bank owned by the Government was held not to offend Article 14 of the Constitution. It is clear that the Government can be legitimately put in a separate category for the purpose of laying down the procedure for the recovery of its dues. Mr. Kapur further relied on *Nand Ram Chhotey Lal v. Kishori Raman Singh*². The judgment of the High Court undoubtedly supports him, but, with respect, we are unable to agree with the ratio of the case. The High Court was concerned with the U.P. Zamindars Debt Reduction Act (U.P. Act XV of 1953), which is substantially similar to the impugned Act. The ratio of the High Court is:

"It appears to us that the Legislature had to make a distinction between debts due from the ex-zamindars to private individuals and the debts due to scheduled banks or to Government or semi-Government authorities. The obvious reason appears to be that the private money-lenders were considered to be a bane to rural economy and perpetrating agricultural indebtedness. It was to save the cultivators from such unscrupulous money-lenders that such laws had to be enacted, the last in series being the Zamindars Debt Reduction Act."

We consider there is no force in these observations. No such reason is apparent from the terms of the Act. Non-scheduled banks and all other private creditors cannot be said to be a bane to rural economy.

1. (1961) 1 S.C.J. 665 : A.I.R. 1961 S.C. 828 : (1961) 2 S.C.R. 962.

2. A.I.R. 1962 All. 521.

The third case relied on by Mr. Kapur—*Jamnalal Ramlal Kintee v Kishandas and State of Hyderabad*¹, does not contain any discussion. The High Court supported the exclusion on the ground that "exclusion of certain class of debts under section 3 of the impugned Act also is not without substantial justification for public demands do not stand in the same position as ordinary demands". Apart from the fact that all the exempted categories are not public demands, the High Court does not seem to have considered whether the differentia had any rational relationship sought to be achieved by the Act.

In conclusion, agreeing with the High Court, we hold that no reasonable classification is disclosed for the purpose of sustaining the impugned part of section 2 (e).

Now, coming to the question of the validity of section 7 (2), we consider that this sub-section is valid as it imposes reasonable restrictions, in the interests of general public, on the rights of a secured creditor. A secured creditor, when he advanced money on the security of *jagir* property, primarily looked to that property for the realisation of his dues. Further, this sub-section has been designed with the object of rehabilitating a *jagirdar* whose *jagir* properties have been taken over by the State for a public purpose at a low valuation. If this provision was not made, the *jagirdar* would find it difficult to start life afresh and look to other vocations, for not only his existing *non-jagir* property but his future income and acquired properties would be liable to attachment and sale for the purpose of satisfying the demands of such secured creditors. Accordingly, we hold that section 7 (2) imposes reasonable restrictions in the interest of general public.

The appeal is accordingly partly accepted, the decision of the High Court in regard to section 2 (e) is confirmed and that in regard to section 7 (2) is reversed. As the respondent was not represented and the appeal has only partly succeeded we order the parties to bear their own costs in this Court.

K S

Appeal partly accepted

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, Chief Justice, K N WANCHOO, J C SHAH, N RAJAGOPALA AYYANGAR, AND S M SIKRI, JJ.

The State of Uttar Pradesh and another

Appellants*

v

Audh Narain Singh and another

Respondents

Constitution of India (1950), Article 311 (2)—Applicability—Tahsildar appointed by Government Treasurer in the State of Uttar Pradesh—If a civil servant of the State or holds a civil post, in the State—Test of relationship of master and servant.

The Government Treasurer in the State of Uttar Pradesh is a civil servant of the State holding a specific post, and he is authorised by the terms of his employment to employ *Tahsildars* to assist him in discharging his duties. Payment of remuneration to the *Tahsildars* is for services rendered in the Cashier Department of the District Treasury of the State. The *Tahsildars* receive their remuneration directly from the State, and are subject to the control of the District Officers in the matter of transfer, removal and disciplinary action. Employment of *Tahsildars* being for the purpose of carrying out the work of the State, even though a degree of control is exercised by the Government Treasurer and the appointment is in the first instance made by the Treasurer subject to the approval of the District Officers, it must be held that the *Tahsildar* is entitled to the protection of Article 311 of the Constitution.

Accordingly an order removing a *Tahsildar* from service which was made at the instance of the Controller without conforming to the requirements of Article 311 (2) of the Constitution was invalid.

Whether in a given case the relationship of master and servant exists is a question of fact, which must be determined on a consideration of all material and relevant circumstances having a bearing on that question. Ordinarily the right of an employer to control the method of doing the work and the power of superintendence and control may be treated as strongly indicative of the relation of master and servant, for that relation imports the power not only to direct the doing of some work but also the power

to direct the manner in which the work is to be done. If the employer has the power *prima facie*, the relation is that of master and servant.

Appeal by Special Leave from the Judgment and Decree dated 13th December, 1960, of the Allahabad High Court, in Special Appeal No. 204 of 1957.

H.N. Sanyal, Solicitor-General of India, (*C.P. Lal*, Advocate with him), for Appellants.

M. C. Setalvad, Senior Advocate (*J.P. Goyal*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Shah, J.—Audh Narain Singh—hereinafter called ‘Singh’—was appointed in 1949 a *Tahvildar* in the District of Azamgarh in the State of U.P. and worked in the Cash Department of the Government Treasury of that District. The appointment of Singh was made by Dhanpat Singh Tandon, Government Treasurer, with the approval of the District Magistrate. By order dated 20th April, 1956, Singh who was then working as a *Tahvildar* in the Sub-treasury at tahsil Lalganj in the District of Azamgarh was informed that he was under instructions from the Collector removed from service. Against the order of removal, Singh preferred an appeal to the Collector but the same was rejected, and a representation made to the Commissioner of the Banaras Division was unsuccessful. Singh then preferred a petition under Article 226 of the Constitution in the High Court of Judicature at Allahabad for a writ of *certiorari* quashing the order of removal passed against him and for a writ of *mandamus* or an order directing the Collector of Azamgarh and the State of Uttar Pradesh, Dhanpat Singh Tandon, Government Treasurer, and the Commissioner of Banaras Division to treat him as a *Tahvildar* in the Sub-treasury at Lalganj in the District of Azamgarh. Singh claimed that he was a member of the civil service of the State of Uttar Pradesh or held a civil post under the State, and was not liable to be removed from service without being afforded a reasonable opportunity of showing cause against the action proposed to be taken in regard to him under Article 311 (2) of the Constitution. Mehrotra, J., who heard the petition held that the Government Treasurer being an employee of the State, a *Tahvildar* employed by the Government Treasurer to carry out the work entrusted by the State, subject to the control of the State Government, was an employee of the State Government, and the impugned order of removal was invalid because Singh was not afforded a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

The order of Mehrotra, J., was confirmed in appeal by the High Court of Allahabad. In the view of the High Court, no direct relationship of master and servant between Singh and the State was established because Singh was appointed by the Treasurer, but the Treasurer having authority to employ him in order to carry out the work of the State, Singh was as much under the control of the State as he was under the control of the Treasurer and therefore he could claim to hold a civil post under the State and to have the benefit of Article 311 of the Constitution. Against the order passed by the High Court, this appeal is preferred with Special Leave.

The question which falls to be determined is whether a *Tahvildar* appointed in the Cash Department in the State of Uttar Pradesh is a civil servant of the State of Uttar Pradesh or holds a civil post in the State. In the State of Uttar Pradesh, contracts for administering the Cash Department of the District Treasuries are given to persons who are called Government Treasurers. The Treasurer holds a post specifically created in the District Treasury: he is appointed by the Collector subject to the approval of the Finance Secretary. On being appointed, the Treasurer enters into an agreement for the due performance of his duties, and executes a bond in favour of the State. The tenure of a Government Treasurer is temporary and he is not entitled to privileges of leave and pension, but he performs duties connected with the executive functions of the State. His appointment is made by the Collector subject to the approval of the Finance Secretary. He has to maintain a true and faithful account of the property entrusted to him and his dealings therewith and to submit returns as prescribed. He is also bound by the conditions,

rules and regulations of the Government and also departmental rules and orders as may be in force, especially with reference to his relations and dealings with and the rights of his subordinates. He has to attend the Government Treasury for the purpose of discharging his duties and to show to his superior officers whenever called upon the property entrusted to him. A Government Treasurer is not in the position of an independent contractor—he does not merely undertake to produce a given result without being in the actual execution under the control of the person for whom he does the work. He is in the execution of his duties, and in the manner, method and mode of his work under the control of the State Government.

A Government Treasurer is entitled to appoint *Tahvildars* to assist him in the discharge of his duties, but the appointment is made with the approval of the District Collector. Originally *Tahvildars* were directly appointed by the Government of the Province to specific posts for performing duties in the District Treasuries. In 1927, however, Government Order dated 25th July, 1927, was issued by the Secretary to Government Uttar Pradesh Finance Department reciting that *Tahvildars* in Sub-treasuries were appointed on the nomination of the Treasurer of the District Treasury, who was responsible for their work and honesty, the intention of the Government being that a Treasurer might dispense with the services of a *Tahvildar* as soon as he had lost confidence in him, but it had not been possible to put this intention into practice, because the *Tahvildars* were paid from the general revenue and were whole time Government servants and entitled to the protection given to all Government servants by the Classification Rules, and it was difficult to hold the usual enquiry for the removal of a *Tahvildar* for he must be removed from service as soon as he lost the confidence of the Treasurer, otherwise the responsibility of the Treasurer to the Government would be impaired. In the circumstances the best solution was to abolish the post of *Tahvildars* to increase the remuneration of the Treasurer by an amount equal to the pay given to *Tahvildars* and to make him responsible for carrying on the work at Sub-treasuries through his own servants. A reservation, however, was made that the Treasurer must not employ any person in the Treasury or Sub-treasury without the approval of the District Officer and the Treasurer shall when required by such District Officer remove without delay any person so employed. Pursuant to this Government Order in the Manual of Orders the following paragraph—1561 was incorporated:

¹ *Tahvildars* at Sub-treasuries are no longer Government servants. They are employed by the Treasurer who receives an allowance from Government to cover their pay and leave salary. The Treasurer however, shall not employ any person as a *Tahvildar* without the approval of the District Officer. The Treasurer shall remove a *Tahvildar* or transfer him from one Tehsil to another if required by the District Officer to do so on any ground which in the latter's opinion justifies such a step.

Even after the posts of *Tahvildar* were abolished the Government of Uttar Pradesh did not adopt a consistent attitude and from time to time issued orders which indicate that a considerable degree of control was maintained by the District Officers upon the *Tahvildars* in the matter of appointment, removal from service, suspension and transfers and in the matter of payment of remuneration, dearness allowance and making available certain medical benefits, *Tahvildars* were treated on a par with other civil servants of the State. On 9th December, 1939, a Government Order was issued for payment of remuneration to the *Tahvildars* directly from the Government Treasury. It had come to the notice of the Government that the Treasurers paid to the "cashier staff of the Treasuries" less than what they received on their account from the Government, after obtaining receipts for full amount. It was therefore directed that the Treasurer, should prepare a statement showing in detail the emoluments of the staff, but payment of emoluments was to be made to the persons concerned by the Treasury Officer personally and their acknowledgment taken. In 1945 the Government of Uttar Pradesh raised with effect from 1st April, 1945 the allowance to be paid to Government Treasurers for the pay of "cashier staff of Treasuries". By Para 3 (a) a scheme for payment of gratuity on retirement was also devised for the benefit of permanent *Tahvildars*. It was provided that when a permanent *Tahvildar* retired, a gratuity of one month's pay will be

given to him for each completed year of service, subject to a maximum of 25 year's completed service, the gratuity being admissible to permanent incumbents of posts and also to future entrants when appointed permanently, but not if the service of a *Tahvildar* was found either unsatisfactory, or if he resigned or was removed or dismissed from service. Gratuity was to be paid in the same manner as salaries were paid to the *Tahvildars*, and provisions on account of the increase due to the pay of Government Treasurers and allowances payable for pay of the cashier staff of Treasuries and for the grant of gratuity to the cashier staff were made under the Heads "25. General Administration—B. District Administration (a) General Establishment—Pay of Establishment Contract and Extra Control Establishment" and "55. Superannuation allowances and Pensions and Gratuities Voted" respectively in the budget. By a letter dated 17th June, 1953, addressed by the Joint Secretary to the Government it was brought to the notice of the Collectors of Districts that the Government Treasurers had frequently dispensed with the services of *Tahvildars* working under them without sufficient reasons justifying such a course of action and attempts had been made to harass such staff and that as a result of such arbitrary action on the part of the Government Treasurers, hardship had been caused to those employees. The Government therefore informed the Collectors to bring to the notice of the Treasurers that adverse notice of such action is likely to be taken by the Government in future in case it was established that the Government Treasurers had indulged in high-handedness in their dealings with their staff. It was also recorded by the Collector of Azamgarh that instances had come to his notice in which the services of the employees in the Cash Department of the Treasuries had been dispensed with arbitrarily without framing specific charges against them or obtaining explanations, and it was ordered that in future when services of the employees in the Cash Department were to be dispensed with, a report for their suspension should be made and specific charges framed against them and they should be given time to explain the charges and their services should not be dispensed with as a result of arbitrary action of the subordinate staff or the Treasurer. Orders have also been lately issued in 1959, by which the scale of dearness allowance of the *Tahvildars* was revised and certain facilities for free medical attendance were also provided.

It also appears that in some cases in which the *Tahvildars* who had been dismissed or suspended were reinstated by order of the Collector. For instance, under Treasury Officer Azamgarh's order dated 14th August, 1948, it was recorded that under Collector's order Naunidh Prasad, *Tahvildar*, Phulpur (under suspension) was reinstated with effect from the date of taking over charge. There is also an order passed by the District Magistrate, Allahabad, in 1952 deputing one Ganesh Prasad working as *Tahvildar* in Handia Sub-treasury for *Kumbha Mela* duty. There is also the record of the disciplinary proceedings held by the District Magistrate on 12th April, 1948, against *Tahvildar* Ganesh Prasad for improper conduct.

It is therefore clear from the record that *Tahvildars* were appointed to perform the duties of cashiers in Government Treasuries. Their appointment was made by the Government Treasurer with the approval of the District Collector, but it was made for performance of public duties, and remuneration was paid to them by the State directly. *Tahvildars* were liable to be transferred under orders of the Collector and to be suspended or removed from service under his orders. An instance already referred to show that a *Tahvildar* who had been suspended by the Treasurer was ordered to be reinstated by the Collector. It is from these circumstances that the relationship between the Government of Uttar Pradesh and *Tahvildars* has to be ascertained.

Whether in a given case the relationship of master and servant exists is a question of fact, which must be determined on a consideration of all material and relevant circumstances having a bearing on that question. In general selection by the employer, coupled with payment by him of remuneration or wages, the right to control the method of work, and a power to suspend or remove from employment are indicative of the relation of master and servant. But co-existence of all these indicia is not predicated in every case to make the relation one of master and servant. In

special class of employment, a contract of service may exist, even in the absence of one or more of these indicia. But ordinarily the right of an employer to control the method of doing the work, and the power of superintendence and control may be treated as strongly indicative of the relation of master and servant, for that relation imports the power not only to direct the doing of some work, but also the power to direct the manner in which the work is to be done. If the employer has the power, *prima facie*, the relation is that of master and servant.

The work of the Government Treasurers has to be conducted according to the Rules and Regulations framed by the Government, and directions issued from time to time. The Government Treasurer holds a post in a public employment and he is assisted by *Tahvildars* in the performance of his duties. The *Tahvildar* acts not on behalf of the Treasurer in performing his duties, but on behalf of the State. Undoubtedly the Treasurer undertakes responsibility for the loss which may be occasioned by the *Tahvildar*, but solely on that account it cannot be held that the *Tahvildar* is merely an appointee of the Treasurer and is not a servant of the State. The selection of *Tahvildar* though made by the Treasurer is controlled by the Collector: the *Tahvildar* is remunerated by the State, method of his work is controlled by the State, and the State exercises the power to suspend, dismiss and reinstate him. In *Shicandan Sharma v. The Punjab National Bank Ltd*¹, it was held that head cashier in one of the branches of the Punjab National Bank Ltd, who was appointed by the Treasurer in charge of the Cash Department under an agreement with the Bank, was an employee of the Bank. In the view of the Court, the direction and control of the Cashier and of the ministerial staff in charge of the Cash Department of the Bank being entirely vested in the Bank, the Cashier must be deemed to be an employee of the Bank. Sinha, J., observed at page 1442.

"If a master employs a servant and authorizes him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for a cash consideration, the employees thus appointed by the servant would be equally with the employer, servants of the master."

Similarly in *Dharangadhara Chemical Works Ltd v. State of Saurashtra*², it was held that "the *prima facie* test of" the relationship of master and servant;

"is the existence of the right in the employer not merely to direct what work is to be done but also to control the manner in which it is to be done, the nature or extent of such control varying in different industries and being by its nature incapable of being precisely defined."

In *Messrs. Pyare Lal Adushwar Lal v. The Commissioner of Income-tax, Delhi*³, it was held that the Treasurer appointed by the Bank who was to carry out the duties as directed by the Bank was a servant of the Bank, and not an independent contractor.

The Government Treasurer is a civil servant of the State holding a specific post, and he is authorised by the terms of his employment to employ *Tahvildars* to assist him in discharging his duties. Payment of remuneration to the *Tahvildars* is for services rendered in the "cashier department of the District Treasury" of the State. The *Tahvildars* receive their remuneration directly from the State, and are subject to the control of the District Officers in the matter of transfer, removal and disciplinary action. Employment of *Tahvildars* being for the purpose of carrying out the work of the State, even though a degree of control is exercised by the Government Treasurer and the appointment is in the first instance made by the Treasurer subject to the approval of the District Officers, it must be held that the *Tahvildar* is entitled to the protection of Article 311 of the Constitution.

The order removing Singh from service was made at the instance of the Controller, and did not conform to the requirements of Article 311 (2) of the Constitution and was on that account invalid.

We therefore agree with the High Court, that the impugned order must be declared invalid.

The appeal fails and is dismissed with costs.

K S.

Appeal dismissed

¹ (1951) 1 S.C.R. 1427.

(1960) 2 M.L.J. (S.C.) 111; (1960 2 A.L.W.R.

² (1957) S.C.R. 152; (1957) S.C.J. 208.

(S.C.) 111.

³ S.C.R. 669; (1960) S.C.J. 1282.

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JUDGES OF THE SUPREME COURT OF INDIA.

(1st January, 1964 to 30th June, 1964).

Chief Justice :

The Hon'ble Mr. Bhuvaneshwar Prasad Sinha, (Retired w.e.f. 1—2—1964)

„ „ P B Gayendragadkar, (Chief Justice w.e.f. 1—2—1964)

Puisne Judges :

The Hon'ble Mr Justice Syed Jafar Imam, (Retired w.e.f. 1—2—1964)

„ „ A K. Sarkar.

„ „ K Subba Rao

„ „ K. N Wanchoo.

„ „ M Hidayatullah

„ „ K. C Das Gupta.

„ „ J. C. Shah.

„ „ Raghubar Dayal.

„ „ N. Rajagopala Ayyangar.

„ „ J. R. Mudholkar.

„ „ S M. Sikri, (w.e.f. 3—2—1964).

The Attorney-General of India :

Shri C. K. Daphtary.

The Solicitor-General of India :

Shri H. N. Sanyal.

The Additional Solicitor-General of India.

Shri S V. Gupte.

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HABEAS CORPUS AGAINST WARRANT OF CONVICTION.

By

G. NARAYAN RAO,

Advocate, High Court, Andhra Pradesh.

RIGHTS POLITICAL *vis-a-vis* FUNDAMENTAL:

In any democracy a citizen is a bundle of rights and duties. Of the several kinds of rights, broadly speaking political and individual rights are supreme and a nation professing democracy should provide the above rights to permissible extent so that a kind of trust transpires between the governed and the governing. These rights are the fruits of a constant struggle so laboriously, and so patiently pursued by the governed against the governing. It so happens that in countries where the plight of the nation is tied to the yoke of colonialism theebb of human consciousness rises in revolt against colonialism and strives in earnestness to remove that fetter from off its nape and confer unto itself all political rights. So also the Indian in his tempestuous voyage from slavery to independence went through a continuous process of dehydration of fundamental rights for a number of centuries under Monarchical, Moghul and Imperialist machineries in order to achieve political rights which he achieved by August, 1947. This conscious convergence of all energies for the realisation of independence surely eclipses in its overwhelming fury, individual rights and in the end when independence is achieved the individual who was hitherto a dumb slave becomes all of a sudden a dumb freeman who though free, has yet not learnt the language of liberty.

The above is finely contrasted with what was obtained in England by its people in the form of Bill of Rights. The Bill of Rights was the outcome of the organic spontaneous urge of the human wave for natural rights and these rights the English had wrested from power, from dragon's mouth as it were. The English know the value and sanctity of these rights as they had fought for them but in the case of Indians these rights were secured as a charity by the constituent assembly although very notable and commendable, yet are not properly taken notice of, or valued or taken care of. In the words of a jurist this act of charity i.e. the conferment of fundamental rights on us is "like presenting Monalisa to a blind populace"¹ meaning that the so called rights are only ornamental. In short the society does not know that the fundamental rights are the only true foundations of true and free life and that so long as it searches to find them out in Part III of the Constitution but not from out of its life, its organic unity and composition, these rights may have to be regarded and counted as detachable ornaments of occasional ceremonial value. They will be treated and reckoned by the people as some rights in which only Advocates dabble and that those are not matters of their concern, but of their Advocates. The same people react differently to question of political rights; they consider these rights as their rights and suffer no interference. This is amply proved in the recent Chinese adventurism to which political threat the entire nation rose in revolt. It is because they know what price they paid and how long they paid the price to become independent.

This unwariness, this lethargy, this calculated unconcern of the people towards their fundamental rights led in its acquiescence to an early unresisted incidence of

1. The view of Mr. K. Narayana Rao, M.A., M.L., Research Scholar, Law Institute, New Delhi.

polio the onset of which was taken advantage of and encroachments with impunity were effected in the form of amendments to Part III of the Constitution and in many other multifarious forms, which cramped and crumpled the growth of the infant rights and eventually rendered those rights to mere paper safeguards capable of being trampled upon without provoking any popular unrest or resentment. The right to *Habeas Corpus* so much so did not receive any differential treatment by the people and that also has been labouring under the self-same malady (viz) imbecility and loss of movement like its other cousins. And it is in this background I may have to study the scope of *Habeas Corpus* knowing all the same that this endeavour of mine will be futile. But a day will certainly come when people learn to treat fundamental rights as valuable and of as much concern to them as their political rights and try to safeguard them in the same manner as they would their independence.

HABEAS CORPUS WHAT IS ?

Though the origin of *Habeas Corpus* is none too distinct the resort to this remedy seems not in frequent and in the early days this remedy was often sought and in justifiable circumstances granted also. *Habeas Corpus* was defined in Bouvier's Law Dictionary thus: "The writ of *Habeas Corpus* is a writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention to do, submit to, and receive whatsoever the Court or Judge awarding the Writ shall consider in that behalf." "The above definition makes it certain that writ of *Habeas Corpus* is unfettered and that it lies in every case of detention where such detention is not warranted according to the Judge or Court to which such application is made. If we are inclined to give *Habeas Corpus* its true scope and its due omnipotence then we must admit that it reaches all conceivable restraints on liberty whether of executive, domestic, legislative or of judicial origin. The crux that matters is not the authority that imposes the restraint but the restraint itself. Hence what the Judge or Court to which an application for *Habeas Corpus* is made has to do is to look at the restraint itself and try to satisfy whether the restraint is justifiable or not without advertent to the authority under which such restraint is brought about. This means that if the restraint is illegal or opposed to principles of natural justice then no matter even if the restraint is under judicial authority, a writ of *Habeas Corpus* will issue. The writ of *Habeas Corpus* is one of the four powerful means of removing the actual injury of false imprisonment without any reference to the power behind such false imprisonment and while the writs of *Main Prize*, *De odio et alia* and *De homine replegiando* have slowly disappeared the writ of *Habeas Corpus* has been constantly attracting the attention of the Courts till to-day with renewed vigour and varied significance. No prison walls are too sacred to impede this searching penetrating cosmic ray of *Habeas Corpus* from piercing, no restraint is too powerful and strong to obstruct the impact of the Writ. *Habeas Corpus* to have the body can be obtained when it is brought to the notice of the Court that any person is restrained of his liberty, illegally, no matter how the restraint was brought about.

NATURE OF THE PROCEEDING CIVIL OR CRIMINAL?

In English Law *Habeas Corpus* was considered civil or criminal according to circumstances under which a particular petition for *Habeas Corpus* arose. It was held in *Reg v. Fletcher*², and later in *Ex parte Alice Woodhall*³, that a cause becomes criminal if the question raised for consideration is related to matter the subject matter of which is criminal and this criteria was followed by our High Courts as decisive of the nature of the proceeding⁴. This proposition as many such others

² L.R. 2 Q.B.D. 43

³ L.R. 20 Q.B.D. 832

⁴ *M. R. Venkateswami, In re* 1 L.R. (1951) Mad. 70 (1950) 2 M.L.J. 186 and *Bardola v. Ex*, A.I.R. 1949 All 513 (F.B.)

are, is just a half-truth like the proverbial prophecy that the unborn child may be either a female or male child. The interpretation put by the American Jurists is far more real and definite and as such rather preferable to that of what the English Law lays down. In American Jurisprudence the concept of right is taken as the decisive factor rather than either the nature of the proceeding or the circumstances under which it arises. *Habeas Corpus* is a substantial civil right of personal liberty. What Blackstone called *Festimen remedium*^{4-a} has come to mean and stay on American soil as a concrete enforceable civil right. The foundation stone for the concept was as usual laid down by Chief Justice Marshall, the name that made law great, the Constitution supreme in *Ex parte Bullman*. That celebrated jewel of a Chief Justice propounded that "the question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated and may be decided in different Courts and that the Writ of *Habeas Corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty." Right to personal liberty from custody, without reference to the kind of custody, is conceived as a civil right and that right is guaranteed under *Habeas Corpus* and therefore, it matters very little whether the custody is by the King in his Castle or by Priest in his temple or by a rouge in his den. It has been correctly assessed and defined by the American Jurists when it was observed that "while the action (*Habeas Corpus*) is designed to secure the release of persons illegally held in custody, it is not designed to punish the official who was guilty of the illegal confinement so the action cannot be considered a criminal one."⁵

Little or no adumbration is needed to say that a criminal proceeding is one designed to punish the person that offended a person or his property which offence is made punishable under a statute. We cannot conceive of a criminal proceeding without punishment attached to it. They are interlinked and cannot exist independent of the other. It is therefore submitted that the English conservative Sir Rogerian's *much-might-be-said on both sides* manner of explaining *Habeas Corpus* does not help resolve the doubt regarding the character and nature of the proceeding and the American view that "*Habeas Corpus* is a civil separate proceeding to enforce civil right, the right to personal liberty whether the restraint be by virtue of criminal or civil process⁶, is by far the most logical and reasonable one preferable to that of the English theory. All liabilities which are not made expressly penal are civil and *Habeas Corpus* is therefore a civil right of personal liberty, which has been reckoned and declared as a fundamental, enforceable right, and the English analysis of *Habeas Corpus* as being one that smacks of civil and criminal characteristics according to the origin of the proceeding is in my humble view not sound and amounts to confusing an otherwise clear concept."

HABEAS CORPUS—HOW SEPARATE.

Chief Justice Marshall said that *Habeas Corpus* is a separate civil proceeding and we shall now see how it could be considered a separate proceeding and also what considerations there are that definitely make it a separate proceeding. *Habeas Corpus* does not attempt to determine the guilt of the accused, neither does it seek to punish the offender. All it attempts is to determine the legality of the restraint. Conversely a criminal proceeding is one wherein the guilt of the accused and his penal liability will be determined. Therefore in *Habeas Corpus* as was held in *Ex parte Tom Tong* "the Court should not inquire into the criminal act complained of but into the right to liberty notwithstanding the act"⁷. This shows that *Habeas Corpus* is not a proceeding whereunder a cause is further agitated on merits. It is

4-a. 3. Blackstone's Commentaries 131.

5. Kinnane, Anglo American Law, 2 Edn., 1952 Pages 664-65.

6. Ex parte *Tom Tong*, 108 U.S. 556, *People v. Knott*, 187 App. Divn. 604, 176 N.Y.S. 321.

7. 108 U.S. 556.

not carrying a matter to another or same tribunal for fresh appreciation and decision. Hence, it cannot be used as a means of appeal^{7-a} or writ of error. The legality of the restraint alone will be subject matter of enquiry in *Habeas Corpus* and it was held that 'the illegality of the restraint does not depend on the guilt or innocence of the party restrained⁸. So much so the Court cannot go into the merits so far as the offence is concerned^{9-a}. That is to say, if a person is guilty of an offence he will be restrained of his liberty because his guilt has been established beyond reasonable doubt and because that conduct of guilt has been made penal under a statute. But in *Habeas Corpus* proceeding, *Habeas Corpus* being one which is not a substitute for a trial to determine innocence⁹, all that one can question is the legality of the restraint without adverting to either the guilt or innocence of the person restrained. This brings us to the conclusion that by *Habeas Corpus* a person restrained may be released if on consideration it is proved to the Court enquiring into the restraint that the restraint is illegal, though he is guilty. It means that release under *Habeas Corpus* is not however an acquittal^{9-a}. The Court faced with *Habeas Corpus* will have to confine its enquiry to fundamental and jurisdictional questions¹⁰. It does not go into the correctness of the conclusion reached by a Court but tries to examine the power and authority of that Court to act in the manner it did¹¹. As has been consistently held in many a decision no inquiry into the legality or justice of any mandate is permitted, except as those terms include question of jurisdiction or power¹².

When the detention is upon process by which and for a cause of action for which, all other matters being right, petitioner may be lawfully imprisoned, the only questions are, whether, under all circumstances of the case, petitioner was properly arrested¹³.

The above decisions make it certain that in *Habeas Corpus* what the Court has to decide is the fundamental and jurisdictional aspect of the restraint and that therefore we can successfully contend that a restraint under judicial commitment may also be questioned on fundamental and jurisdictional matters, although the finding of guilt cannot be agitated. It is therefore submitted that right to civil liberty under *Habeas Corpus* and right of acquittal under Criminal Law are two different rights and are separate the former being a guaranteed constitutional remedy while the latter is merely a procedural remedy.

WHAT IS JURISDICTION OR POWER TO ACT

Jurisdiction or power to act means that investiture of power either upon a Court or a person or a body of persons constituting a Court, tribunal or authority to administer justice according to law. But this conferment of jurisdiction is again conditioned by certain other important factors which control the exercise of jurisdiction. They are (1) external, (2) internal and (3) fundamental limitations and for the sake of convenience we may call them jurisdictional components, for, their bearing strictly is confined to jurisdictional aspect of the Court or authority acting. Hence

7-a *Ex parte Coke* (1954) 2 All E.R. 440. In re Newton, 139 E.R. 692.

8 *State v. Jensen* 191 N.W. (Min.) 908.

8-a 1949 All E.R. 373.

9 *Ex parte Craig* 287 Fed. 133.

9-a *R v. Officer Commanding Depot Battalion R.A.S.C. Colchester, Ex parte Elliott* (1949) All E.R. 373 at page 379. Per Lord Goddard C.J.

10 *Collins v. Johnston* 237 U.S. 502.

11 *Ex parte Craig, People Exrd Doyle v. Atwell* 232 N.Y. 96.

12 *Peo. Ex rel Farrington v. Menschig* 187 N.Y. 879 N.E. 884, 10 L.R.A. NS 625.

13 *Pettier v. Pennington*, 14 N.J.L. 312, 316.

it means one thing to say the Court has jurisdiction and an altogether different thing to say that the Court can act. The Court does not act simply because jurisdiction is conferred on it but because coupled with the jurisdiction there is strict compliance of the requirements of the other relevant jurisdictional components. In the category of external, jurisdictional components which have determined control over the exercise of jurisdiction by Court, come questions relating to (1) subject-matter, (2) parties, (3) particular question for decision, (4) pecuniary value, (5) territoriality and (6) limitation. The importance of the above factors in determining the legality or otherwise of the exercise of jurisdiction by Courts is so well known that it needs little or no comment at all.

But by internal jurisdictional components I mean certain internal checks on the exercise of jurisdiction like (1) sentencing accused in an appeal against acquittal to them term which the lower Court could in view of the limitation on its sentencing power, award, (2) awarding sentence within its power although the offence is made punishable with a sentence far above and beyond its power, and thirdly confining the exercise of jurisdiction to the charge and conviction against which the appeal is brought by the Prisoner but not against the charge or charges, on which he was acquitted. The above three examples strictly relating to criminal law, I believe are enough to bring home the principle governing the aspect of internal jurisdictional components and the necessity for strict compliance with it for a Court exercising jurisdiction is implicit and it hardly needs elaboration.

Coming now to fundamental jurisdictional components what I mean is the basic constitutionality of the exercise of power by Court. This questioning of the constitutionality of the power is otherwise widely known in legal phraseology by the term *ultra vires*. Under *ultra vires* several doctrines have come into vogue and it is under one or many of the doctrines that the power will be questioned. It may be, on the competence of the Legislature basing on either principles of federation or division of powers or on fundamental rights or under a host of other familiar similar constitutional doctrines. Here it may be apt to point out that if the exercise of jurisdiction is bad for either non-compliance with external or internal jurisdictional requirement it is only the decision that becomes save in some circumstances an illegality and a nullity but if it is hit by the third category it is not only the decision that becomes an absolute nullity but also the provision under which it is done. The provision becomes void and will be struck down. In short while the first two categories control the operation of jurisdiction the third, not only controls but questions the conferment of the very jurisdiction itself. Consequently, it is these jurisdictional aspects that in *Habeas Corpus* the petitioner questions and such questioning as has been submitted earlier is a fundamental right which does not smack of any criminal characteristics, to confine and characterise it as a criminal proceeding. Violations of jurisdictional components result in jurisdictional imperfections and they may be either procedural or substantive or constitutional. It has been held that procedure is "the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer, the machinery as distinguished from its product"¹⁴ procedural imperfections may be curable or incurable, depending upon the nature and extent of the violation and its effect on the decision. But if the imperfection results from violation of substantive or constitutional mandates nothing prevents the questioning it under any one of the constitutional remedial rights and much more so under *Habeas Corpus*. It cannot be disputed that writ of *Habeas Corpus* or any other writ for that matter, is a remedial relief, a curative for all constitutional infirmities and jurisdictional ailments. Hence it is neither the beginning of a proceeding nor further carrying of one for decision. It is a proceeding by itself and separate, not being a procedural remedy. The proceedings under Article 32 are vindicative, objective and impersonal; they are measures

14. *Poyser v. Minors*, (1881) L.R. 7 Q.B. 329, 333.

meant for the enforcement of the general rights of the community against the governing

JURISDICTION OF COURTS PROCEDURAL & SOVEREIGN

Habeas Corpus is a right that resides in the sovereign and although it enures to the benefit of the meanest and lowliest of the subjects against the most powerful, the recipient of the remedy is merely nominal, a mere initiator of the proceeding. The queen has an obligation and a right to 'inquire into the cause for which any of her subjects are deprived of their liberty'¹⁵, irrespective of any procedural remedy the subject may possess and may have exhausted

As in contempt of Court in *Habeas Corpus* the petitioner does no more than initiate proceedings in the name of the sovereign invoking the right of the sovereign. It is not a procedural remedy, it is more of an objective proceeding than a subjective one. Hence, it is meaningless to say that it is criminal jurisdiction, it is, if one has to call it by a name corrective sovereign fundamental jurisdiction. The conceptual distinction between the two is so vivid and appariant that any attempt to confine it to answer and conform to a criminal proceeding becomes *ex facie* absurd and is meritless. This right of *Habeas Corpus* is much wider in scope in India because of judicial supremacy than what is obtainable in Britain. There is a right and solemn duty cast on the guardian Courts of fundamental rights to see that no citizen is deprived of his liberty not only unjustly but also not under unjust or invalid laws.

In a republican type of Government the Constitution is, more or less a solemn pledge, a sacred contract, whereunder every right, obligation or duty of each of the participants, are enumerated in a manner quite expressive, explicit and irrevocable. It may be each with rank suspicion that the other would encroach upon his inalienable rights if not reduced into writing, entered into an agreement, defining the sphere of activity that each of them should confine in his or its dealings. So in this splendid contract of divisions of powers, duties and forbearances the contracting parties being of opinion that "all men are born with certain inalienable rights, among which are life, liberty and pursuit of happiness, and that to secure these rights Governments are instituted men, deriving their just power from the consent of the Government"¹⁶, certain fundamental rights have been enumerated in the Constitution as having been the rights of the ultimate sovereign : the governed which they can enforce in a Court of law. It is in essence a justifiable proposition to say that the Governed being of opinion that suspicion better serves their interests than honest and implicit faith in the other contracting parties i.e., the governing bestowed unto themselves certain fundamental rights. It is undeniable that in a republican type of Government all power is derived from the ultimate sovereign : the people and so if the people reserve for themselves certain rights it is implicit that those rights cannot be abridged in any manner save as is provided under the Constitution for suspension or abridgement of them. Any other manner of abridgement of those rights means an unwarranted interference, for when there are express provisions as to how and in what circumstances and manner they can be suspended or restricted the question of superseding those rights by necessary implications does not arise. We know that limitation of a power is strong argument in favour of the existence of such power and exception of any particular case presupposes that all those which are not included in such exception are embraced within the terms of a general prohibition. So it means that interference with fundamental rights either by the Executive or by the Legislature of even by Judiciary, the three branches of the Governing will certainly result in the issuance of an appropriate

15 2 Roll Abr 69

16 George Hickerson 10 American Bar Association Journal 1924, 571 78

writ. The definition of State in Article 12 of the Constitution should always mean the three organs of the Government except where it is specifically used to indicate separation of powers and other functions of and between the State and Centre. It may sound rather anomalous to say that Judiciary is also open to the writ jurisdiction but it cannot be helped because in a federation every type of power whether executive, legislative or judicial is subordinate to the Constitution and when a judicial decision offends the Constitution it can be rectified by a suitable Writ.

In America it was recognised that due process guarantee is available against a judicial decision both in its procedural¹⁷, and substantive aspects¹⁸. The only plausible way of resolving the paradox is by dividing the exercise of jurisdiction by the guardian Court as procedural in matters where it exercises jurisdiction as a Court of appeal or review or revision of fact or law or of both and sovereign fundamental in cases where it has to enforce fundamental rights under Article 32. It is for this reason alone the Constituent Assembly did not name the jurisdiction the Supreme Court exercises under Article 32 and this eloquently explains their silence. If this division of jurisdiction as procedural and fundamental sovereign is accepted then the guardian Court can declare decisions coming from the procedural realm *ultra vires* the Constitution except where the constitutional aspect has also been raised and decided, through its sovereign fundamental jurisdiction under Article 32. The above is but one step from what the Supreme Court has observed in *Budhan v. State of Bihar*¹⁹ that Article 14 extends to all State action including even acts of the judiciary and would hit arbitrary or wilful discrimination by a Court but it does not guarantee uniformity of decision or the exercise of judicial discretion. It cannot be said that Article 32 is controlled by Articles 132 to 136 i.e., the procedural realm. Our guardian Courts which call a spade a spade when occasion requires will certainly and unhesitatingly strike down when it comes to striking down a decision of its own coming from the procedural realm if it is found out that it is not consistent with the fundamental rights. For example unguided uncanalised delegation of power should be unconstitutional no matter whether it is delegated to the Executive or Judiciary and the Courts exercising sovereign fundamental jurisdiction under Part III of the Constitution will certainly apply the same axe without discrimination. Although unguided conferment of power on Judiciary may be safe but a Legislature which is incompetent to confer such power on the Executive is also incompetent to empower the Judiciary with such forbidden power and therefore, such vesting of power becomes *ultra vires* the Constitution. Hence, a decision born out of such unguided power is vulnerable to the undiscriminating axe of the Supreme Court. The S. C. has struck down its own rule where under a heavy deposit was insisted on every petition under Article 32 of the Constitution. Therefore, the jurisdiction under Articles 132 to 136 is subordinate and subject to the sovereign fundamental jurisdiction under Article 32 of the Constitution.

HABEAS CORPUS v. WARRANT OF CONVICTION.

Conviction obtained under any law which is inconsistent with either the fundamental rights or the constitutional doctrines like (1) commerce clause, (2) export and import clause, (3) delegated legislation, (4) occupied field and repugnancy and (5) extra territoriality and also similar other doctrines, is in effect a conviction under a law which is void. Under Articles 13, 251 and 254 all laws repugnant to the Constitution are not only declared to be void to the extent of repugnancy but also can be declared as such through a Court of law. For example, if a person is convicted for non-payment of State sales tax on the sale of electricity to the Central Govern-

17. (1930) 281 U.S. 573.

18. (1941) 312 U.S. 321.

19. 1955 S.C.J. 163 see also 118 U.S. 356.

ment (which is prohibited by the Constitution) and when his appeal on merits is dismissed it does not mean that his right under Articles 32 and 287 is extinguished or exhausted or that his conviction is one obtained in accordance with law. He can petition for the issue of *Certiorari* and *Habeas Corpus* on the ground that in as much as the conviction is under a statute which is *ultra vires* the Constitution the conviction and the imprisonment are illegal. It will be palpably absurd to say that convictions under invalid or absolutely void laws are cured by providing appeals or by hearing and dismissing appeals on such convictions. That amounts to saying that the factum of conviction having not been set aside in appeal cures law of its invalidity and that the guarantee under Article 13 (1) and 32 is subservient to procedure provided under another statute or rules provided elsewhere in that behalf. If this proposition is accepted as correct the much praised and loudly acclaimed fundamental rights become something of a second rate, second hand rights of a much inferior variety, inferior even to procedural remedies. In the result a dismissal of an appeal and a further revision at the stage of admission, by the Sessions Judge and the High Court respectively on a conviction under an invalid law becomes a bar and indirectly controls the jurisdiction of the Supreme Court under Article 32, not to speak of its extinguishment of the fundamental rights of the citizens. When Constitution should be supreme and be the touchstone of all other laws, it will be the very reverse of it if we adopt the proposition that dismissal of appeal cures the law of its repugnancy to the Constitution. This virtually renders Articles 32 and 226 ineffective, illusory and in-operative. Precisely to that effect is the decision of the Supreme Court in *In re Janardhan Reddy*²⁰. But this decision with great respect I submit cannot be of a binding nature because it covers ground which is beyond its jurisdiction. It is well known that 'jurisdiction must be acquired before judgment is given'²¹. And so when the Court holds that it has no jurisdiction it should and normally every Court does, leave the other disputed questions unpronounced. Courts have jurisdiction to decide that they have no jurisdiction but that cannot be extended beyond that limited scope. If for any reason it goes further and decides other questions in dispute, I have no doubt, and the law in that respect is very clear that it amounts to exercising jurisdiction it does not possess. The dictum is that 'where a Court takes it upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing'²². It is a simple norm that a Court to decide a dispute must possess jurisdiction and pronouncement without the requisite jurisdiction is a decision without authority. In legal phraseology such pronouncement amounts to an extra judicial opinion or a *gratis dictum* which cannot be said to be binding. The decision in so far as it concerns the question of jurisdiction raised there is only of a binding nature and all other disputed questions of law or fact even if decided are not binding because to decide these things the Court itself emphatically decided that it had no jurisdiction.

The Supreme Court being of the view that Article 32 (2) is not retrospective in operation should have desisted from entering into discussion whether *Habeas Corpus* lies when it is apparent from the warrant that the imprisonment is under a warrant of conviction. Their Lordships' attention was not drawn to all the relevant aspects of the question. In *re Newton*²³ mainly on which decision the Supreme Court has based its decision, what was agitated was a question of fact viz., whether the offence alleged took place where the prosecution alleged it to have taken place or at a different place beyond the jurisdiction of the Court as alleged by the petitioner in the petition. Incidentally this decision is an authority on the proposition that *Habeas Corpus* cannot be used as a writ of error. In this the Court rightly dismissed the petition because in the guise of illegality an appeal on fact and merits was agitated. In short the place of offence was what was sought for decision. If juris-

20 (1951) S.C.J. 320

21 *Thompson v Shiel* (1840) 3 Ir Eq R. 135

22 *A G v Lord Hotham* (1827) 3 Russ 415

23 *In re Newton* 139 E.R. 692

ditional imperfection is dependent upon appreciation of a set of facts or upon the existence or non-existence of a set of facts it is undeniable that a writ of *Habeas Corpus* does not lie because its scope is not that of a Court of Appeal. The observations of Jermis, C.J., as extracted in the decision of the Supreme Court clearly bear this out. He observed "*Newton has been tried and convicted on an indictment alleging that the offence charged was committed within the jurisdiction of the Central Crime Court. Either that was traversed or the jurisdiction was admitted by pleading over.*" If it were traversed the finding of the jury is that the prisoner committed the offence within the jurisdiction of the Court as alleged. *He now seeks to impeach that finding on the ground that the place where the offence was actually committed is more than one thousand yards distant from the boundary of the parish in which the record alleges it to have been committed. That is not to be governed by the inquiry whether the fact be indisputable or otherwise.* (Italics mine). The other judge also observed "whether it was so (i.e., within the jurisdiction (insertion mine) or not was as much a matter of fact to be proved, or admitted as any other fact alleged in the indictment, in order to establish the conviction". It is very clear from the decision that the petition was dismissed because what was sought for decision is a disputed question of fact, a finding of the jury, which falls outside the scope of *Habeas Corpus*, it being in the nature of and comprehension of a writ of error.

Every trial involves the exercise of judicial power and it is also necessary to determine from what source a Court derives its power and to determine the question, resort must be had to the Constitution and the laws enacted under and pursuant thereto²⁴. If in the test the power of the Court is held to be illegal or unconstitutional, the conviction under such illegal or unconstitutional exercise of power must also be held illegal, void and unconstitutional. And, therefore, such convictions obtained under invalid laws may be questioned by way of *Habeas Corpus* coupled with the ancillary relief of *Certiorari*. It was held that where the detention is under invalid law *Habeas Corpus* is the proper remedy²⁵. It was also held that "as unconstitutional law being void is as no law, an offence created by it is not a crime, a conviction under it is not merely erroneous but is illegal and void and cannot be a legal cause of imprisonment." To the same effect is the decision in *Ex parte Hollman*²⁶ wherein it was said that "while a writ of error or appeal cannot be supplemented by resort to *Habeas Corpus* for the correction of mere errors of law the distinction is that Courts are bound to treat unconstitutional enactments as void in whatever proceedings they may be encountered, and an unconstitutional statute, though having the name and form of law, is in reality, no law, and the Courts must liberate one suffering imprisonment thereunder just as if there had never been the form of trial, conviction and sentence". Relief under *Habeas Corpus* was also given where a city ordinance was so unreasonable as to be void.²⁷

In English Law also, starting from *In re Authors*²⁸, where in it was laid down that by affirming the conviction the Appellate Court does not give jurisdiction the Magistrate does not possess. *Habeas Corpus* has been held to be a proper remedy in appropriate cases and occasionally these writs have been granted in appropriate cases. In *Ex parte Boydell*²⁹ a writ of *Habeas Corpus* against a warrant of conviction was given by Goddard, C.J., and he observed that "The paragraph in the Royal warrant which purports to retain the applicant on the active list, is in the opinion of this Court, void as in conflict with the act of Parliament. It follows that the applicant is in illegal custody. The writ will issue. Let the prisoner be discharged. Leave granted to apply for order of *certiorari* and preptory order to quash conviction granted²⁹. In *Ex parte Ames*³⁰, also a writ of *Habeas Corpus* was issued against

24. *Ex parte Milligan*, 4 Wall 2, 119-121.

25. *Ex parte Siebald*, 100 U.S. 371.

26. 79 S.C. 9.

27. *Ex parte Reterson*, 42 Tax. Cr. 250, 58 N.W. 1011.

28. (1899) L.R. 22 Q.B.D. 345 at 350.

29. *Ex parte Boydell*, (1948) 2 K.B. 193 : (1948) 1 All E.R. 438.

30. (1953) 1 All E.R. 1002.

a warrant of imprisonment on the ground that the warrant was issued and the commitment was made for a wrong amount. The law governing *Habeas Corpus* is that "if the Magistrate had no jurisdiction in the matter, this writ might have been an available remedy but such writs are not to be obtained by confusing jurisdiction with merits".³¹

It is, therefore, clear from the above that a writ of *Habeas Corpus* will issue in all cases of illegal imprisonment even if the imprisonment is under warrant of conviction. In my humble view the warrant of conviction, is neither above Constitution nor so sacred as to hinder the penetration of this fundamental writ of liberty. If the warrant of conviction is allowed to prevail despite its illegality apparent on the face of it, it in effect makes procedure prevail over constitutional rights and remedies, a very painful instance of adjective law triumphing over substantive and constitutional law. It denies the fundamental rights of their most vital force, the enforceability, which the Constitution vouchsafes.

³¹ L R (1917) 1 K B 176 at page 180

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo
and *K. C. Das Gupta, JJ.*
24th March, 1964.

Md. Qasim Larry v.
Muhammad Shamsuddin.
C.A. No. 251 of 1963.

Payment of Wages Act (IV of 1936), section 2 (vi)—“Wages”.

Section 2 (vi) of the Payment of Wages Act, includes wages directed to be paid by industrial adjudication. A.I.R. 1951 Cal. 29, not approved and A.I.R. 1950 Bom. 342 and (1953) 1 L.L.J. 557, approved.

M. C. Setalvad, Senior Advocate (*R. C. Prasad*, Advocate, with him), for Appellants.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo
and *K. C. Das Gupta, JJ.*
24th March, 1964.

G.M. Talang v.
Shaw Wallace & Co., Ltd.
C.A. No. 513 of 1963.

Master and servant—Clerical and subordinate staff—Age of retirement—Compulsory retirement—Pension Insurance Schemes.

On the contrary, the awards and agreements on the question of age of retirement about which information is furnished by the several documents on the record clearly show consistent trend in the Bombay region to fix the retirement age of clerical and subordinate staff at 60. The very few departures from this practice which the Tribunal has mentioned are, in our opinion, wholly insufficient to indicate any slowing down of this trend. What the Tribunal has failed to notice is that instances which may justify a revision of the judicial opinion expressed on an earlier occasion about a particular trend must be strong and unambiguous and they must speak for the period both before and more particularly after the previous finding had been recorded in the matter.

S. V. Gupte, Additional Solicitor-General of India (*C. L. Dudhia, K. T. Sulo, Atul-Rahman* and *K. L. Hathi*, Advocates with him), for Appellants.

M. C. Setalvad, Senior Advocate (*N. V. Phadke*, Advocate, and *J. B. Dadachanji, O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 1.

G.R.

Appeal allowed.

[SUPREME COURT.]

M. Hidayatullah and
N. Rajagopala Ayyangar, JJ.
24th March, 1964.

Mara v.
Mst. Nikko alias Punjab Kaur
C.A. No. 490 of 1962.

Custom—Punjab—Inheritance—Preferential heirs—Mixed properties ancestral and non-ancestral—Personal Law.

Now, it has been ruled in the Punjab consistently that where lands are so mixed up that the ancestral and non-ancestral portions cannot be separated they must be regarded as non-ancestral, unless it is shown which are not. Land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent.

Paragraph 24 of Rattigan's Digest which excludes sisters from inheritance from non-ancestral property is too widely stated. The learned District Judge cited some instances in which the sisters and sisters' sons were allowed to succeed in preference to collaterals. One of the documents filed by the defendants in the suit (Exhibit D-6) also supports the contention of the respondents. In this view of the matter it cannot be said that the application of the personal law to the family by the Courts below was erroneous. It is contended lastly that the rulings only show that collaterals of 5th degree are excluded and there is no case showing that a collateral of 4th degree was excluded. If personal law applies, as it does, a collateral of the 4th degree is also excluded.

Kartar Singh Chawla and *Harbans Singh*, Advocates, for Appellants.

I. M. Lal and *M. R. K. Pillai*, Advocates, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT]

*M Hidayatullah and
N Rajagopala Ayyangar, JJ*
24th March, 1964

U P Forests Act (VI of 1949), sections 15, 28, 29—Criminal Procedure Code (V of 1898) sections 349, 530 (p)

The State of U P v
Sabir Ali
Cr A No 193 of 1962

The scheme of the Criminal Procedure Code read with the provisions of section 15 of the Forests Act clearly shows that offences under section 15 of the Act are not triable by any Magistrate as it would be if the Second Schedule were applicable. They are therefore triable by such Magistrates as have been named in the second sub-section. There is good reason for holding this, because a conviction by a Magistrate of the Second or the Third Class, as the case may be, is open to an appeal whereas a conviction by a Magistrate of the First Class and a sentence of fine of Rs 50 or under or a fine of Rs 200 after a summary trial is not appealable. It is possible that it was intended that a right of appeal should be conferred and therefore the trial of these offences was restricted to Magistrates of the Second and the Third Class. It is a circumstance which may be taken into account. It is illustrated in this case. An appeal would have lain against the same decision if the Magistrate had not been given the powers of a First Class Magistrate during the trial and the respondents were robbed of a right of appeal. In any event, in view of the clear words of section 29 (1), the trial of these cases ought to have been before a Court designated in section 15 (2) of the Act and as the trial was before a Magistrate who was not empowered to try the offence the proceedings were rightly declared void under section 530 (p) of the Code of Criminal Procedure.

O P Rana, Atiqul Rehman and C P Lal, Advocates, for Appellant

G R

Appeal dismissed

[SUPREME COURT]

*A K Sarkar, K C Das Gupta and
N Rajagopala Ayyangar, JJ*
30th March, 1964

*Amalgamated Electricity Co., Ltd. v.
N S Bathena*

C A Nos 590 591 of 1963

Electricity Act (1910)—Electricity (Supply) Act (1948)—Bombay Electricity (Surcharge Act, 1946)—Electricity (Supply) Act (1948) as amended by Act (CI of 1956), sections 57, 57 A, Sixth Schedule

Notwithstanding the generality of the words in section 57 A (1) (a) (i) of the Electricity (Supply) Act 1948 as amended by Act (CI of 1956) referring to the failure on the part of the licensee in complying with the requirements of the 'Sixth Schedule', there are some failures in regard to which the jurisdiction of the civil Court is it is clear not barred.

The mere existence of section 57 A does not by itself and without reference to the particular violation complained of by the licensee, bar the jurisdiction of a civil Court.

There is no presumption that the rate charged by a licensee contravenes the statutory prohibition. It is for the party who alleges his right to relief to establish the facts upon which such relief could be obtained. It was, therefore, for the plaintiffs to prove by facts placed before the Court that the rate charged offended the statutory provision. This they admittedly failed to do and therefore, they were not entitled to the declaration and injunction which the learned Judge of the High Court granted.

H N Sanyal, Solicitor General of India (M M Gharekhan and I N Shroff Advocates, with him), for Appellant (In C A No 590 of 1963)

H N Sanyal, Solicitor General of India and M C Setalvad, Sen or Advocate, (M M Gharekhan and I N Shroff, Advocates, with them), for Appellant (In C A No 591 of 1963)

Narasindas C Malkani, Advocate and J B Dadachanji, O C Mathur and Ravinder Narain, Advocates of M/s J B Dadachanji & Co., for Respondents (In both the appeals)

G R

Appeals allowed

[SUPREME COURT.]

*P. B. Gajendragadkar, C.J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar and
S. M. Sikri, JJ.*

31st March, 1964.

*N. Raghavendra Rao v.
The Deputy Commissioner, South
Kanara, Mangalore.
W.P. No. 211 of 1963.*

Mysore General Services (Revenue Subordinate Branch) Recruitment Rules 1959—State Reorganisation Act—Article 311 (2) of the Constitution—Article 16 of the Constitution.

Before embarking on varying the conditions of service, the State Governments should obtain the concurrence of the Central Government. The Central Government after examining various aspects came to the conclusion that it would not be appropriate to provide for any protection in the matter of travelling allowance, discipline, control, classification, appeal, conduct, probation and departmental promotion. This amounted to previous approval within the Proviso to section 115 (7) of the States Reorganisation Act. It may be mentioned that by the memorandum the State Governments were required to send copies of all new rules to the Central Government for its information. The rules were validly made.

The State of Madras has not been made a party to this petition and the petitioner never raised these points while he was serving under the State of Madras. It is difficult at this stage to challenge orders which if quashed would affect the rights of other civil servants who are not parties to this petition. At any rate, the petitioner has not been able to show how Article 16 was infringed before he was allotted to the new Mysore State. The State in its reply has asserted that all the orders complained against were passed by competent authorities, after considering the merits of the petitioner on each occasion. It was for the competent authorities to judge the merits of the petitioner. We find no force in this contention and hold that no infringement of Article 16 has been established.

R. K. Garg, Advocate, (amicus curiae), for Petitioner.

C. K. Daphtary, Attorney-General for India, (B. R. L. Iyengar and B. R. G. K. Achar, Advocates with him), for Respondents.

G.R.

Petition dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, C.J., K. N. Wanchoo
and K. C. Das Gupta, JJ.*

31st March 1964.

*The Tata Oil Mills Co. Ltd. v.
The Workmen.
C.A. No. 517 of 1963.*

Industrial Enquiry Standing Order 22 (viii)—Principles of natural justice.

It would be unreasonable to include within Standing Order 22 (viii) any riotous behaviour without the factory which was the result of purely private and individual dispute and in course of which tempers of both the contestants became hot. In order that Standing Order 22 (viii) may be attracted, the appellant should be able to show that the disorderly or riotous behaviour had some rational connection with the employment of the assailant and the victim.

Since the enquiry has been fairly conducted, and the findings recorded therein are based on evidence which is believed, there would be no justification for the Industrial Tribunal to consider the same facts for itself. Findings properly recorded at such enquiries are binding on the parties, unless, of course, it is known that the said findings are perverse, or are not based on any evidence.

The domestic enquiry in the instant case was properly held and fairly conducted and the conclusions of fact reached by the Enquiry Officer are based on evidence which he accepted as true. That being so, it was not open to the Industrial Tribunal to reconsider the same questions of fact and come to a contrary conclusion.

G. B. Pai, Advocate, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Appellant.

P. Govinda Menon, M. S. K. Iyengar and M. R. K. Pillai, Advocates, for Respondent No. 1.

G.R.

Appeal allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo,
M. Hidayatullah, K.C. Das Gupta and
N. Rajagopala Ayyangar, JJ.

1st April, 1964.

Gurdev Singh Sidhu v.
State of Punjab.

Writ Petition No. 200 of 1963.

Constitution of India (1950), Article 311 (2)—Validity of Article 9 (1) of the Pepsu Services Regulations Volume I as amended by the Governor of Punjab by the Notification dated 19th January, 1960

Article 9 (1) of the Pepsu Service Regulations as amended by notification issued by Governor of Punjab dated 19th January, 1960 contravenes Article 311 (2) of the Constitution and must be struck down as invalid.

The termination of the service of a permanent public servant under such a rule, though called compulsory retirement, is, in substance, removal under Article 311 (2). It is because it was apprehended that rules of compulsory retirement may purport to reduce the prescribed minimum period of service beyond which compulsory retirement can be forced against a public servant that the majority judgment in the case of *Moti Ram Deka, etc. v. The General Manager, North East Frontier Railway, etc.* (Civil Appeals Nos. 711-14 of 1962 etc., decided on 5th December, 1963) clearly indicated that if such a situation arose, the validity of the rule may have to be examined, and in doing so, the impugned rule may not be permitted to seek the protection of the earlier decisions of this Court in which the minimum qualifying period of service was prescribed as high as 25 years, or the age of the public servant at 50 years.

K.P. Bhandari and R. Gopalakrishnan, Advocates, for Petitioner.

S.V. Gupta, Additional Solicitor-General of India (Gopal Singh and R.N. Sachthey, Advocates with him), for Respondents.

G.R.

Petition allowed.

[SUPREME COURT.]

A.K. Sarkar, Raghubar Dayal, and
J.R. Mudholkar, JJ.

1st April, 1964.

Devji v.
Magan Lal R. Atharana.
C.A. No. 46 of 1961.

Partnership Act (IX of 1932), section 22—Scope.

Section 22 of the Indian Partnership Act, 1932, clearly provides that in order to bind a firm by an act or an instrument executed by a partner on behalf of the firm, the act should be done or the instrument should be executed in the name of the firm, or in any other manner expressing or implying an intention to bind the firm. The sub-lease (in the instant case) was not executed in the name of the firm, and it has been found by the Courts below that respondent No. 4 in obtaining the lease, did not act on behalf of the firm. This in substance means that in obtaining the sub-lease, the parties to it did not intend to bind the firm by that transaction.

Sarjoo Prasad, Senior Advocate (N. Mukherjee, Advocate with him), for Appellant.

R.C. Prasad, Advocate, for Respondents Nos. 1 to 3.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J.,
K.N. Wanchoo, and
K.C. Das Gupta, JJ.

1st April, 1964.

Hochitief Gammon v.
Industrial Tribunal, Bhubaneswar.

C.A. No. 611 of 1963.

Industrial Disputes Act (XIV of 1947), section 18 (b) as amended by Act (XXXVI of 1956) and amended section 18 (3) (b)—Section 10 (1)—Additional parties whether necessary or not.

Where the appropriate Government desires that the question as to who the employer is should be determined, it generally makes a reference in wide enough

terms and includes as parties to the reference different persons who are alleged to be the employers. Such a course has not been adopted in the present proceedings, and so, it would not be possible to hold that the question as to who is the employer as between the appellant and M/s. Hindustan Steel Ltd. is a question incidental to the industrial dispute which has been referred under section 10 (1) (d) of the Industrial Disputes Act. This dispute is a substantial dispute between the appellant and M/s. Hindustan Steel Ltd. and cannot be regarded as incidental in any sense, and so, we think that even this ground is not sufficient to justify the contention that M/s. Hindustan Steel Ltd. is a necessary party which can be added and summoned under the implied powers of the Tribunal under section 18 (3) (b).

N.C. Chatterjee, Senior Advocate, (*G. Narayanaswamy*, Advocate, *J.B. Dadachanji*, *Ravinder Narain* and *O.C. Mathur*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him), for Appellant.

Janardhan Sharma, Advocate, for Respondent No. 2.

S.V. Gupta, Additional Solicitor-General of India (*G.B. Pai* and *R.H. Dhebar*, Advocates with him), for Respondent No. 3.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, *K.C. Das Gupta* and
Raghubar Dayal, JJ.
1st April, 1964.

Ramachandra Narsimha Kulkarni v.
State of Mysore.
Cr.A. No. 202 of 1962.

Post Office Act (VI of 1898), sections 52, 53 and 55—Meaning of words “wilful and wilfully”.

By majority:—The very fact that this comparatively heavy punishment of two years' imprisonment has been prescribed for wilful detention while lighter punishment has been prescribed under sections 49, 50 and 51 of the Post Office Act, justifies the conclusion that the word “wilful” was used by the Legislature to mean only such detention which was deliberate and for some purpose.

In section 52 the Legislature after making punishable the offence of theft of a postal article or of dishonest misappropriation of the same, also made punishable the secretion, destruction or throwing away any postal article if done “for any purpose whatsoever.” It is reasonable to think that in section 53 when the word “wilfully” was used, the Legislature also intended that the detention would be punishable only if made for some purpose.

In the instant case the allegation was that the purpose with which the postal article was detained was the purpose of theft of the contents of the envelope. As however the existence of that purpose has not been established it must be held that the detention was not deliberate and on purpose, but as a result of either inadvertence or carelessness or negligence. So, the appellant cannot be said to have detained or delayed the article “wilfully”.

W.S. Barlingay, Senior Advocate, (*A.G. Ratnaparkhi*, Advocate with him), for Appellant.

R. Gopalakrishnan and *B.R.G.K. Achar*, Advocates, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT]

*K Subba Rao, K C Das Gupta and
Raghubar Dayal, JJ*
1st April, 1964

*K Narasimhaiah v
H C Singri Gowda*
CA No 223 of 1964

Mysore Town Municipalities Act, 1951, section 27 (3), proviso to section 23 (9), section 24 (1) (a) and 36—Article 320 of the Constitution of India

The very fact that while three clear days' notice is not to be given of all special general meetings and for some such meetings notice only of such shorter period as is reasonable has to be given justifies the conclusion that the "three clear days" mentioned in section 27 (3) of Mysore Town Municipalities Act was given by the Legislature as only a measure of what it considered reasonable. The provision in section 27 (3) is only directory and not mandatory.

S K Venkataranga Iyengar and R. Gopalakrishnan, Advocates, for Appellant

N S Krishna Rao and Girish Chandra, Advocates, for Respondents Nos 1, 2, 4 to 10 and 12 to 15

G R

Appeal dismissed

[SUPREME COURT]

*P B Gajendragadkar, C J, A N Wanchoo,
M Hidayatullah, Raghubar Dayal, and
J R Mudholkar, JJ*
29th September, 1964

*The Life Insurance
Corporation of India v
S V Oak*
CA No 443 of 1962

Life Insurance Corporation Act (XXVI of 1956)—Insurance Act, 1938—Life Insurance (Emergency Provision) Ordinance 1956 which was followed by Act IX of 1956 of the same name—Meaning of 'Surplus'

The word "surplus" in section 26 of the Life Insurance Corporation Act has the technical meaning which arises from the Insurance Act which is made applicable for purposes of valuation by section 43 of the Life Insurance Corporation Act read with Notification No G S R 734 dated 23rd August, 1958. That meaning is also apparent from section 26 of the Life Insurance Corporation Act quoted above. Indeed, the two sections are intimately connected.

The two sections must be read harmoniously and it could not have been intended that section 28 was to be used to negate what section 9 provided so explicitly. We think that on this harmonious construction we must hold that section 28 does not put any bar in the way of the Corporation in the fulfilment of its obligations arising under section 9. To this interpretation we readily incline because, as pointed out above, to hold otherwise would render section 28 in its latter part *ultra vires* the Constitution as it would amount to taking away by a side wind property of other persons.

*M C Setalvad, Senior Advocate, S N Andley, Advocates, for Appellant
K V Joshi and Ganpat Rai, Advocates, for Respondents
S V Gupta, Solicitor-General of India (Intervener), for Attorney General
G S Pathak, Senior Advocate and K R Chaudhury, Advocate with him, for other Interveners*

G R

Appeal dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—BHUVANESHWAR PRASAD SINHA, *Chief Justice*, P. B. GAJENDRA-GADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND K. C. SHAH, JJ.

The Corporation of the City of Nagpur

. . . Appellant*

v.

The Nagpur Handloom Cloth Market Co., Ltd. and another . . . Respondents

City of Nagpur Corporation Act, 1948—C. P. & Berar Municipalities Act, (II of 1922), Assessment Rules thereunder—Rule 10 (a)—“Family”—Scope and meaning of.

The expression ‘family’ in Rule 10 (a) of the Assessment Rules has according to the context in which it occurs a variable connotation. It does not in the setting of the Rules postulate the existence of relationship either of blood or by marriage between the persons residing in the tenement. The word ‘occupy’ used in Rule 10 (a) is not restricted either expressly or by anything contained in the context of the rule suggesting that the occupation is to be only for residential purposes and in the absence of any such implication the rule must be deemed to be of general application *i. e.* it applies to uses non-residential as well as residential. The expression ‘family’ must therefore take colour from the expression ‘occupy’ used in the same rule. The expression ‘family’ in the context in which it occurs means no more than a person or a group of persons.

The Assessment Rules clearly indicate that the occupier of the premises may be rendered liable to pay the conservancy tax and the water-rate.

The rule applies to buildings occupied for non-residential as well as residential purposes, and to every part of a building occupied by a person or a group of persons having a separate source of income, whether the occupation is for residential or non-residential purpose and such person or group of persons would be liable to pay the conservancy tax and the water-rate.

Appeal by Special Leave from the Judgment and Order dated the 8th August, 1958, of the Bombay High Court in Special Civil Application No. 174 of 1958.

G. S. Pathak, Senior Advocate (*S. M. Hajarnavis*, Advocate and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

M. C. Setalvad, Attorney-General for India (*M. N. Phadke* and *Naunit Lal*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

SHAH, J.—The Nagpur Handloom Cloth Market Company, Ltd. hereinafter called ‘the Company’—constructed on certain plots owned by it, two houses—each house consisting of a ground floor, intended to be used as shops and an upper floor intended to be used for residential purposes. For the use of the occupants of the shops, 20 flush lavatories with underground sewers connected with the drainage system of the Nagpur Corporation were constructed by the Company. The Corporation of Nagpur had also erected a municipal public water standard within 200 yards of the houses. Among the taxes levied by the Municipal Corporation under section 114 of the City of Nagpur Corporation Act, 1948—hereinafter called ‘the Act’—were the conservancy tax and the water-rate which under the rules applicable thereto were leviable as rates on the annual letting value of buildings and lands within the Corporation areas. It is common ground that the shops which in the aggregate number 201, are occupied by shop-keepers under a scheme under which on payment of stipulated amounts, the occupants will be full owners of the shops, and on the liability of all the occupants being discharged the Company will be dissolved. However the scheme under which this arrangement was made has not been placed before us and it is not possible on the material before us to ascertain what the true relation between the shop-keepers and the Company is.

For the year 1953-54 the Corporation of Nagpur proposed to assess the shop-keepers numbering one hundred and fifty-five who occupied the shops built by the Company to private conservancy tax, water-rate and property tax on each shop as a separate unit of assessment, and assessment notices in that behalf were issued to the Managing Director of the Company on 26th September 1953. The Company requested the Corporation by letter, dated 30th September 1953, that the assessment notices be served on the 'individual shop-keepers of the respective shops regarding the assessment made by the Corporation'. The Corporation thereupon served the individual shop-keepers with notices of assessment. 120 out of 155 shop-keepers served with the notices of assessment preferred objections submitting *inter alia* that the taxes could be assessed only on the Company. These objections were heard before the Objection Officer appointed by the Corporation. The Managing Director of the Company and a representative of the shop-keepers submitted their respective cases on behalf of the Company and the shop-keepers. By his order, dated 19th April 1954, the Objection Officer held that the Company be treated as owner of the houses and the shop-keepers as occupants and that the demand for tax be 'primarily made from the occupants'. No proceedings challenging this order were initiated by the shop-keepers or the Company and the assessment list was authenticated as required by the relevant rules. The Corporation thereafter served demand notices upon the shop-keepers calling upon them to pay the taxes due by them pursuant to the assessment list.

On 16th December 1954, some of the occupants appealed to the Chief Executive Officer under section 387 of the Act challenging the validity of the assessment. The Deputy Chief Executive Officer rejected the appeals against the order passed by the Objection Officer to the Chief Executive Officer as incompetent and observed that in any event the appeals which were not presented within the period of limitation prescribed by section 379 of the Act, were barred. The shop-keepers and the Company preferred separate appeals to the District Judge, Nagpur, against the order of the Objection Officer. The District Judge by his order, dated 28th October 1955 held that the appeals were barred by the law of limitation and the appellants before him had made out no ground for condonation of delay. The shop-keepers again moved the Chief Executive Officer to reconsider the order of assessment of tax. That Officer by his order, dated, 18th April 1956, held that even though the order passed by the Deputy Chief Executive Officer dismissing 'the previously filed appeals' as not maintainable, and observing that the proper remedy of the shop-keepers and the Company aggrieved was an appeal under section 130 of the Act was erroneous, the appeals before him being barred by the law of limitation, he was unable to grant any redress to the appellants. The Chief Executive Officer also opined that the houses having been divided into separate shops and allotted to the Company's shareholders who carried on their business independently and each such allottee having a separate source of income within the meaning of Rule 10 (a) of the Assessment Rules, the Objection Officer was right in holding that each shop be treated as an independent unit, and be separately assessed for conservancy cess and water-rate.

Nearly two years thereafter the Company and one Sitaram—one of the shop-keepers—preferred a Writ Petition in the High Court of Bombay at Nagpur for writs of *certiorari* quashing the order of demand, dated 19th February 1958 and also bills for the assessment years 1956-57 and 1957-58 and for a writ of *mandamus* prohibiting the Corporation from applying the provisions of Rule 10 (a) for purposes of conservancy tax and water-rate, and directing the Corporation not to treat the individual shops on the ground floor of the two houses as separate units of assessment for purposes of conservancy tax and water-rate. The High Court held that Rule 10 (a) of the Assessment Rules applied only to residential houses and not to houses occupied for non-residential purposes and therefore separate assessment of the shops in the occupation of the shop-keepers was, under the provisions of the Act, read with the relevant rules, invalid. The High Court

accordingly allowed the petition and quashed the notice of demand, dated 19th February 1958, made by the Corporation for levy of tax. The Corporation has, with Special Leave, appealed to this Court.

Three principal contentions are raised by counsel for the Corporation in support of the appeal:—

- (1) That under the Act there are three distinct stages dealing with the liability of tax-payers to pay tax:—imposition of tax authorised by a statute according to the procedure prescribed in that behalf; assessment or levy of tax according to the provisions of the statute and the Rules framed thereunder; and collection of tax. Each stage being self-contained, if no objection is made to assessment as prescribed by the statute and the Rules made thereunder and in the manner provided in that behalf, in a proceeding for recovery of tax, the validity of the assessment cannot be challenged.
- (2) The objection raised by the Company was only against the demand and not against the assessment, and that in any event there was gross delay in the commencement of proceedings in the High Court for obtaining relief by an application for writ, and on that account the Company had disentitled itself to relief.
- (3) That even on the merits the interpretation placed by the High Court upon Rule 10 (a) of the Assessment Rules was erroneous and therefore each occupant of the shops whose name was entered in the assessment list as framed was liable to pay the conservancy tax and the water-rate in respect of the shop in his occupation.

Part IV of the Act deals with taxation, *i.e.*, imposition, assessment and recovery of taxes. Sections 114 and 115 set out the taxes which the Corporation is obliged to impose or may impose and the procedure in that behalf. Sections 116 to 140 deal with the assessment of property tax and sections 154 to 169 deal with recovery of taxes. Section 130 provides for a right of appeal to the District Court against a dispute as to the liability of any land or building to assessment of property tax or as to the basis or principle of assessment of property tax. Section 164 provides for an appeal against a notice of demand for tax due under sub-section (1) of section 155. This appeal lies to a Magistrate by whom under the direction of the District Magistrate such class of cases is to be tried. A general right of appeal is granted by section 387. Any person aggrieved by an order passed under the Act or under any rule or bye-law made thereunder failing to obtain redress may appeal to any Corporation Officer appointed by the Chief Executive Officer to hear such appeals, or failing such appointment, to the Chief Executive Officer.

The procedure for assessment of conservancy tax and water-rate is prescribed not by the provisions of the Act, but by the Rules framed under the C.P. & Berar Municipalities Act of 1922 which by virtue of section 3 (2) of the Act are to be deemed to have been made under the provisions of the Corporation Act of 1948. The procedure for recovery is however governed by the provisions of sections 154 to 167 of the Act. The subject of taxation in the matter of conservancy tax and water-rate is therefore found distributed in the Act and the Rules under three heads of imposition, assessment and recovery of taxes.

For the purpose of the present case it is unnecessary to express any opinion on the plea raised by Mr. Pathak for the Corporation that the tax-payer cannot challenge the correctness of an order of assessment, in a proceeding for recovery of tax, though it may appear that under the analogous provisions contained in the Bombay District Municipal Act (III of 1901) and the Bombay Municipal Boroughs Act (XVIII of 1925) in an appeal against a notice of demand to a Magistrate the correctness or propriety of the assessment may be challenged.

See *The Municipal Borough of Ahmedabad v. The Aryodaya Ginning and Manufacturing Company Ltd.*¹ and *The Municipality of Ankleshwar v Chhotabhai Ghelabhai Gandhi*²

There has undoubtedly been great delay in moving the High Court by a petition under Article 226 of the Constitution. The order of the Objection Officer was made on 19th April, 1954 and the appeal against that order was dismissed on 22nd April, 1955. Even the second order by the Chief Executive Officer was made on 18th April 1956 and for nearly two years thereafter no proceeding was commenced in the High Court challenging the validity of that order. The High Court was, however, of the view that because the Chief Executive Officer in the first instance held that the appeal filed before him was not competent and the remedy of the tax-payer was to move the District Court under section 130 of the Act and that in the appeal preferred in the year 1956 he held that the appeal was maintainable and dismissed it on the merits while observing that it was barred by limitation, there was some ground for not regarding the shop-keepers and the Company as guilty of laches. The High Court also observed that after the order passed by the Chief Executive Officer in 1956 the Corporation was moved by an application under section 143 of the Act, and since the decision of the Corporation on the application, the petition was filed without delay. This ground may appear to us inadequate, but the High Court has exercised its discretion in holding that the petition notwithstanding the delay should be entertained and we are unable in a matter essentially of discretion to set aside the judgment of the High Court on this ground alone, especially when the petitioners have claimed relief not only in respect of the assessment for the year 1953-54 but also in respect of assessment of tax for the years 1956-57 and 1957-58.

The question that falls then to be determined is about the true interpretation of Rule 10 (a) of the Assessment Rules relating to the conservancy tax and water-rate. Section 114 of the Act requires the Corporation to levy, amongst others, a property tax, a latrine or conservancy tax payable by the occupier or owner upon private latrines, privies or cesspools or upon premises or compounds cleansed by Corporation agency and a water-rate where water is supplied by the Corporation. For assessment of the property tax, machinery is prescribed in the Act itself, but no such machinery is prescribed in the Act in respect of the conservancy tax and water-rate. Under the C P and Berar Municipalities Act (II of 1922) by section 66 various taxes could be imposed by the Municipalities governed thereby (and the Municipality of Nagpur was governed by that Act) and latrine or conservancy tax and water-rate were two out of the many taxes leviable. By section 71 of the Act of 1922 power was conferred upon the State Government to make Rules under the Act, *inter alia*, regulating the assessment of tax. In exercise of the powers the Government of Madhya Pradesh framed diverse sets of Rules dealing with assessment, levy and collection of taxes. Rules were made on 19th August 1941, declaring liability of buildings and lands for conservancy tax in respect of private latrines, and Rule 2 thereof, in so far as it is material, provided that—

"2. There shall be imposed—

(1) : * * * * *

(ii). On every building or land to which a private latrine, privy or cesspool is attached or any resident whereof uses a private latrine, privy or cesspool, which is either cleansed by municipal agency or is connected with the municipal underground sewer, or the premises or compounds of which are cleansed by municipal agency, a tax payable by the owner under section 66 (1) (h) according to the following scale on its gross annual letting value.

A similar set of Rules in respect of water rate came to be promulgated on 28th September, 1949. It was provided by Rule 1, in so far as it is material, that—

"1. There shall be imposed—

(1) (a) * * * * *

(b) On every building or land which has no private supply from municipal service pipes or the resident thereof does not use water from such supply and which is situated within 200 yards from public water standard or a service pipe, a tax leviable from the owners or occupiers under section 66 (1) (k) according to the following scales on its gross annual letting value :—

In 1941 Rules were made for assessment of conservancy tax. The tax was to be levied on the gross annual letting value of the building. By Rule 5 it was provided that on the completion of the assessment, notices shall be given to the persons affected by the preparation of the assessment list. Any person affected by the entries in the list was by Rule 6 entitled to file objections against assessment or valuation or both as shown in the Register at any time within thirty days of the publication or service. This rule also provided for affording a hearing to the objectors. Rule 8 provided that after the objections under Rule 6 had been disposed of and all consequential amendments were made in the assessment list it shall be authenticated and the Register shall be valid from the date of the authentication and shall continue to be valid until the beginning of the half-year next following the authentication of a new Register. Rule 10 (a) provided :—

“Where more than one family having separate sources of income, occupy separate portions of the same building or range of buildings, each of such portion shall be deemed a building under these Rules and assessed according to its gross annual letting value as determined in accordance with Rule 1.”

Clause (b) provided :

“The Committee may, at a special meeting if it thinks fit assess the tax on such building on the aggregate gross annual letting value of all the portions instead of assessing each portion separately.”

Clause (c) provided :

“Detached building, even when occupied by the same person or family, shall, where any road or pathway over which the public have a right of way, or any land belonging to any other person separate them from one another, be separately assessed as independent units.”

Similar Rules were made in respect of the assessment list for water-rate. The water-rate was also to be imposed as a rate on the gross annual letting value and provisions of Rule 10 (a), (b), and (c) were in terms identical with the assessment rules framed in respect of the conservancy tax assessment and for the sake of brevity we will only refer to Assessment Rules relating to conservancy tax. These Rules remained in force even after the C.P. & Berar Municipalities Act, 1922, was repealed by virtue of section 3 (2) of the Act of 1948, and applied to assessment of liability to conservancy tax and water-rate as if the Rules were framed under the latter Act.

‘Building’ is defined in the Act by section 5 (7) as including “a house, outhouse, stable, hut, shed or other enclosure, whether used as a human dwelling or otherwise and shall include verandahs, fixed platforms, plinths, door-steps, walls and the like.” The definition is an inclusive definition, and contains inherent indication that a part of a building would be a building for the purposes of imposition of liability to pay rates, and assessment of such liability. It is manifest that under the scheme of the Act read with the Rules, conservancy tax and water-rate are to be levied as rates on the gross annual letting value and a rate can only be levied from a person in respect of the tenement or premises occupied as an independent unit. The Assessment Rules provide for levy of rate on the gross annual letting value of the building, and inasmuch as the expression ‘building’ according to the definition given in section 5 (7) of the Act would include a part of a building, the Corporation is competent to frame a list in respect of several tenements occupied by different persons treating each tenement as a separate building for levy of tax. That is implicit in Rule 10 (b) and also in Rule 10 (c) of the Assessment Rules.

By the Rules, liability to pay conservancy tax and water-rate is imposed in respect of a building provided certain conditions specified in the rule are fulfilled, and this liability arises whether the building is used for residential purposes or

non-residential purposes Rule 10 (a) also clearly authorises the Corporation to levy water-rate and the conservancy tax in respect of separate tenements occupied by different persons as if each such tenement is a building. In the view of the High Court use of the expression 'family' in Rule 10 (a) indicated that the rule did not apply to buildings occupied for non-residential purposes. But by the Rules imposing the conservancy tax and the water rate, all buildings to which are attached latrines cleansed by municipal agency and all buildings which are connected with the water distribution system, or which are situate within the prescribed distance of water standards, are liable to pay the conservancy tax and the water-rate irrespective of the nature of the use to which the building is put. It is implicit in the view of the High Court that a building occupied for non-residential use can be taxed as one unit, even if the building is occupied by tenants or licencees, carrying on their separate or individual trades or businesses. But this view, does not appear to be supported by the scheme of the Act and Rules. If a building is partly occupied for residential and partly for non-residential purposes the portions occupied for residential purposes would, in the view of the High Court, be regarded as separate buildings and each occupant having a separate source of income would be liable to pay conservancy tax and water-rate but the portions occupied for non-residential purposes would not be regarded as separate buildings. The High Court reached its conclusion that Rule 10 (a) did not apply to portions of buildings when they were occupied for non-residential purposes merely because of the use of the expression 'family' in the Rule. But the expression 'family' has according to the context in which it occurs, a variable connotation. It does not in the setting of the Rules postulate the existence of relationship either of blood or by marriage between the persons residing in the tenement. Even a single person may be regarded as a family and a master and servant would also be so regarded. The word 'occupy' used in Rule 10 (a) is not restricted either expressly or by anything contained in the context of the rule suggesting that the occupation is to be only for residential purposes, and in the absence of any such implication the rule must be deemed to be of general application; *i.e.*, it applies to uses non-residential as well as residential. The expression 'family' must therefore take colour from the expression 'occupy' used in the same rule. In our view the expression 'family' in the context in which it occurs, means no more than a person or a group of persons.

Mr. Pathak appearing on behalf of the Corporation submitted that there was a drafting error in Rule 10 (a), and as a matter of interpretation the Court would be justified in reading the expression 'family' in that rule as meaning 'family or person'—which is the expression used in Rule 10 (c). He submits that Rule 10 (a) and Rule 10 (c) deal with the same subject-matter and, therefore, the Court would be justified in holding that the expression 'one family' used in Rule 10 (a) and the expression 'person or family' in Rule 10 (c) must have the same meaning. *Prima facie*, there is substance in this contention, but we do not think it necessary to base our decision on that ground. In our view the expression 'family' has not a restricted meaning as suggested by the High Court, and under the Rules imposing liability to pay conservancy tax and water-rate liability is imposed upon every building, which expression includes a part of a building occupied as an independent unit irrespective of the nature of the user. The learned Attorney-General appearing on behalf of the Company submitted that under the Corporation Act the owner and not the occupier is liable for the conservancy tax and water-rate and therefore separate assessments of different units occupied by the shop-keepers could not be made. This plea was not raised in the High Court. Even apart from this infirmity, there is no substance in the plea. Under section 114 of the Act a latrine or conservancy tax payable by the occupier or the owner may be imposed. Similarly water-rate may be imposed, when water is supplied by the Corporation. By the Rules framed under section 71 of the C. P. and

Berar Municipalities Act of 1922, and continued under the Act of 1948 liability imposed for payment of the conservancy tax and the Assessment Rules, is not restricted to owners only. By Rule 4 of the Assessment Rules the Corporation is required to prepare an assessment list containing the names of *the persons liable to pay the tax*. The Assessment Rules therefore clearly indicate that the occupier of the premises may be rendered liable to pay the conservancy tax and the water-rate. Section 165 of the Act makes all sums due from any person in respect of taxes on any land or building, a first charge upon the said land or building and upon any movable property found within or upon such land or building and belonging to the said person, provided that no arrears of any such tax shall be recoverable from any occupier who is not the owner, if such arrears are for a period during which the *occupier* was not in occupation. It is implicit in section 165 that an occupier of the premises may be liable to pay the tax even though he is not the owner. It is also necessary to point out that the scheme under which the shop-keepers are occupying the premises has not been produced before this Court. It is, admitted, however, that the shop-keepers will be owners of the premises occupied by them as soon as the amounts which they have agreed to pay are fully paid and their liability discharged. The Company treated the shop-keepers as owners (*vide* their letter, dated 30th September, 1953.) Manifestly they have a substantial interest in the tenements in their occupation and it would be difficult not to call them owners for purposes of municipal taxation. According to the definition in section 5 (37) of the Act 'owner'.

"When used with reference to any land or building includes the person for the time being receiving the rent of the land or building or of any part of the land or building whether on his own account or as agent or trustee for any person or society or for any religious or charitable purpose, or as a receiver who would receive such rent if the land, building or part thereof were let to a tenant".

There is nothing on the record to show that the shop-keepers would not be entitled to let out the premises in their occupation and if they can they would be regarded as owners within the meaning of clause (37) of section 5.

In our view, therefore, the High Court was in error in holding that Rule 10 (a) applied only to building occupied for residential purposes. The rule in our judgment applies to buildings occupied for non-residential as well as residential purposes, and to every part of a building occupied by a person or a group of persons having a separate source of income, whether the occupation is for residential or non-residential purposes and such person or group of persons would be liable to pay the conservancy tax and the water-rate.

The appeal therefore is allowed and the petition filed by the Company and the tax-payer Sitaram Upasrao dismissed with costs in this Court and the High Court.

K.L.B. Appeal allowed.

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR, K. N. WANCHOO,
K. C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.

Anakapalle Co-operative Agricultural & Industrial Society Ltd. . . *Appellant**

v.

Workmen and others

. . *Respondents*

Industrial Disputes Act (XIV of 1947), section 25-FF—Transfer of undertaking—Compensation to workmen—Purchaser, if a successor-in-interest—Relevant factors—No claim for compensation against purchaser—Retrenchment under section 2(oo) and termination of service under section 25-FF—Distinction—Compensation and re-employment—Opposed to principle.

The question as to whether a purchaser of an industrial concern can be held to be a successor in interest of the vendor will have to be decided on a consideration of several relevant facts. Did the purchaser purchase the whole of the business? Was the business purchased a going concern at the time of the sale transaction? Is the business purchased carried on at the same place as before? Is the business carried on without a substantial break in time? Is the business carried on by the purchaser the same or similar to the business in the hands of the vendor? If there has been a break in the continuity of the business what is the nature of the break and what were the reasons responsible for it? What is the length of the break? Has goodwill been purchased? Is the purchase only of some parts and the purchaser having purchased the said parts purchased some other new parts and started a business of his own which is not the same as the old business but is similar to it? These and all other relevant factors have to be borne in mind in deciding the question as to whether the purchaser can be said to be a successor in interest of the vendor for the purpose of the industrial adjudication. The decision of the question must ultimately depend upon the evaluation of all relevant factors and it cannot be reached by treating any one of them as of over riding or conclusive significance.

In all cases to which section 25 FF of the Industrial Disputes Act applies the only claim which the employees of the transferred concern can legitimately make is a claim for compensation against their employers. No claim can be made against the transferee of the said concern.

By amending section 25 FF the Legislature has made it clear that if industrial undertakings are transferred the employees of such transferred undertakings should be entitled to compensation, unless of course the continuity in their service or employment is not disturbed and that can happen if the transfer satisfies the three requirements of the Proviso.

If a transfer is fictitious or benami section 25 FF has no application at all. In such a case, there has been no change of ownership or management and despite an apparent transfer, the transferor employer continues to be the real employer and there has to be continuity of service under the same terms and conditions of service as before and there can be no question of compensation.

The termination of services resulting from transfer or closure is not retrenchment and it is on the basis of the correctness of this decision that section 25 FF as amended has been enacted. Besides on a construction of section 25 FF itself it is difficult to equate the termination of services with which it deals with retrenchment covered by section 25 F. Section 25 F is referred to in section 25-FF to enable the assessment of compensation payable to the employees covered by section 25 FF. The clause 'as if' clearly shows the distinction between retrenchment under section 2, (oo) and termination of service under section 25 FF.

If the transferor is by statute required to pay retrenchment compensation to his workmen it would be anomalous to suggest that the workmen who received compensation are entitled to claim immediate re-employment in the concern at the hands of the transferee. The contention that in cases of this kind the workmen must get retrenchment compensation and re-employment almost simultaneously is inconsistent with the very basis of the concept of retrenchment compensation.

Appeal by Special Leave from the award, dated 6th June, 1961, of the Industrial Tribunal, Andhra Pradesh, Hyderabad, in Industrial Dispute No 13, of 1960.

C. K. Daphtary, Solicitor-General of India (*K. Srinivasamurthy* and *Narain Lal*, Advocates with him) for Appellant.

B. P. Maheshwari, Advocate, for Respondent No. 1.

A. S. R. Chari, Senior Advocate (*M. K. Ramamurthy*, *R. K. Garg* and *T. S. Venkataraman*, Advocates, with him), for Respondent No 2.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The principal question which arises in this appeal has relation to the scope and effect of section 25-FF of the Industrial Disputes Act, 1947 (XIV of 1947) (hereinafter called the Act). An industrial dispute between the appellant, Anakapalle Co-operative Agricultural and Industrial Society, and the respondents, its workmen, was referred by the Governor of Andhra Pradesh for adjudication to the Industrial Tribunal, Hyderabad, under section 10 (1) (d) of the Act on 7th December, 1960. The respondents who were in the employment of Vizagapatnam Sugar and Refinery Ltd. (hereinafter called the Company) claimed that they were entitled to re-employment in the said concern which had been purchased by the appellant and since their demand for re-employment by the appellant was not accepted by it, they represented

to the State Government that the said demand should be adjudicated upon by an Industrial Tribunal. That is how their demand for re-employment came to be referred under section 10 (1) (d).

It appears that the Company was an old Company which manufactured sugar. Its business, however, did not result in profits, because the supply of sugarcane was insufficient and the management apprehended that it could not face the losses from year to year, and so, it thought of shifting its business to Yerravaram in East Godavari where it anticipated that the supply of sugarcane was assured. This attempt of the management, however, did not succeed because of the local cane growers. The local cane growers decided to form a co-operative society themselves and to purchase the concern of the Company. Accordingly, the appellant-Society was formed and the sale transaction was effected between the said concern and the appellant on 7th, October 1959. It was agreed between the appellant and the Company that the Company should pay retrenchment compensation to its employees and terminate their services leaving the appellant full freedom to choose its own employees. Accordingly, Rs. 1,90,000 were paid by the Company to its employees by way of retrenchment compensation. Before the completion of this transaction, however, the employees had suggested that their Union would itself purchase the concern, but the Union could not manage to effect the proposed sale transaction. It, however, suggested that the compensation of Rs. 1,90,000 which the Company had to pay to its employees may be credited to the account of the Society and the employees paid the said amount by instalments, but this suggestion was not accepted and as a result of the sale transaction, the appellant took over the concern and employed such persons as it needed according to the recommendations of a Committee appointed by the appellant in that behalf. It appears that on the rolls of the Company, there used to be 800 workmen in all; of these 329 were permanent workmen, whereas 471 workmen joined the Company as seasonal workmen. The appellant has employed 678 employees in all, 248 of whom are permanent and the rest seasonal employees. Out of 248 employees who are engaged on a permanent basis, 220 are from amongst the employees of the Company and about 28 have been newly appointed. In the result, about 49 permanent employees and 103 seasonal employees of the Company have not been absorbed by the appellant and the demand which has been referred for adjudication in the present proceedings is that these permanent and seasonal employees should be absorbed by the appellant.

The appellant disputed this claim on three grounds. It urged that the dispute referred to the adjudication of the Tribunal was not an industrial dispute and so, the reference was incompetent. This argument was based on the allegation that the Thummapala Sugar Workers Union which had sponsored the present demand was not a representative Union. On its roll, a very small number of the appellant's present employees were shown as members. The bulk of its membership consisted of the previous employees of the Company. The appellant's employees have formed a separate Union of their own and this latter Union has not only not sponsored the present demand, but it seeks to resist it. The Tribunal considered the evidence bearing on this point and held that the sponsoring Union was, in law, competent to raise the present industrial dispute, and so, it rejected the appellant's contention about the invalidity of the reference.

The next contention raised by the appellant was that it was not a successor-in-interest of the Company and as such, under industrial law, the claim made by the respondents for re-employment of the permanent and the seasonal employees was not sustainable. The Tribunal has held that the appellant is a successor-in-interest of the Company, and so, it has come to the conclusion that the demand for re-employment of the said specified employees was permissible under the industrial law.

The last argument raised by the appellant was that it had already employed a full complement of the labour force that it needed and so, there was no scope for the re-employment of any of the workmen on whose behalf the present dispute was raised. This contention has been rejected by the Tribunal and it has ordered the appellant to re-employ as many of the permanent employees out of 49 as were left out in favour of the new employees and to re-employ the remaining permanent employees as and when vacancies occur. In regard to the seasonal employees, it made a similar direction. This order requires the appellant to guarantee to the re-employed workmen continuity of service and one-fourth of the back wages. The Tribunal has however, held that if the Society has employed less workers, then only as many old workers should be reinstated as the new workers appointed in their place. In that case, the old workers will be absorbed in the order of seniority. It is against this order that the appellant has come to this Court by Special Leave.

The first question which falls to be considered in this appeal is whether the appellant is a successor in interest of the Company. The learned Solicitor-General contends that the agreement of sale under which the appellant has arrived on the scene clearly shows that it cannot be treated as a successor-in-interest of the Company. The terms of the agreement of sale show that the appellant has left with the Company a part of its land, its investments to the tune of Rs 19 lakhs and its liability to the tune of Rs 27 lakhs. 4 000 bags of processed sugar have also been left with the Company at the time of the transaction. Clause 8 of the agreement provides that the Company will be entitled to withdraw and appropriate to itself all advances, part payments and deposits made by it either in cash or security and the Society shall have no right over them. Clause 13 similarly provides that the Company will pay all its liabilities, secured and unsecured, determined or to be determined, and the Society will not be liable to pay the same. Under clause, 11, the godown in which the stocks of sugar were stored was to continue in the possession of the Company free of rent or compensation until the entire stock was released, sold and delivered. The Company had also agreed to terminate the services of its employees on or before 9th October 1959, and clause 7 which deals with this topic, has provided that whatever claims are to be paid to such employees on account of such termination will be paid by the Company. The appellant has also not purchased the goodwill of the company. The argument, therefore, is that though the work of the Company was, in a sense, a going concern when it was purchased by the appellant, the appellant had not purchased the entire concern including the goodwill, and so, it would be inappropriate to describe the appellant as the successor in interest of the Company.

In support of his argument, the learned Solicitor General has relied on the decision of the Labour Appellate Tribunal in the case of *Ramjilal Nathulal & Ors v Humabhai Mills Company Ltd (No 2) & Ors*¹. In that case, the Appellate Tribunal had to consider the effect of two transfers (1) in favour of the Humabhai Mills Co. Ltd and (2) in favour of the New Gujarat Cotton Mills Company Ltd. The decision of the Appellate Tribunal was that the first transfer did not make the transferee a successor-in-interest, whereas the second one did. In regard to the first transfer it was found that the transferee Company had not purchased the transferor Company as a going concern and had not accepted any liabilities of the old Company and had started a completely new business of its own. On the other hand, under the second transfer, the transferee had purchased not only all the tangible assets of the old Company, but the goodwill which was expressly valued in the sale-deed at a very large sum of Rs 3 lakhs. It was also found that the transferee Company carried on the same business as the transferor Company. In the result, the employees of the transferor Company in the first transaction were held not entitled to make

a claim for re-employment by the transferee Company, whereas a claim made by the employees of the transferor Company in regard to the second transfer was held to be sustainable in law. It appears that this decision was challenged by a Writ Petition before the Bombay High Court, and the High Court took the view that in view of the relevant findings recorded by the Labour Appellate Tribunal in respect of the transfer in favour of the New Gujarat Cotton Mills Ltd., there would be no justification to interfere under Article 226 of the Constitution, *vide New Gujarat Cotton Mills Ltd. and Labour Tribunal*¹.

The learned Solicitor General has also referred to another decision of the Labour Appellate Tribunal in the case of *Antony D'Souza & Ors. v. Sri Motichand Silk Mills*². The question which fell for the decision of the Appellate Tribunal in that case was whether the purchaser could be said to be successor-in-interest within the meaning of section 114 of the Bombay Industrial Relations Act, and it was held that the purchaser was not a successor-in-interest, because the transaction was a purchase of only plant, machinery and accessories and not of a going concern or running business. We ought, however, to add that the decision in this case was substantially, if not entirely, based on the fact that the workmen of the transferor Company had executed a document in which specific and unambiguous demands had been made which supported the purchaser's claim that the transfer did not make the purchaser a successor-in-interest of the vendor. This question was sought to be raised before this Court in the case of *Workmen of Dahingepar Tea Estate v. Dahingepar Tea Estate*³, as well as in the case of *Kays Constructions Co. (Private) Ltd. v. Its Workmen*⁴, but on both the occasions, the Court thought it necessary to decide it.

The question as to whether a purchaser of an industrial concern can be held to be a successor-in-interest of the vendor will have to be decided on a consideration of several relevant facts. Did the purchaser purchase the whole of the business? Was the business purchased a going concern at the time of the sale transaction? Is the business purchased carried on at the same place as before? Is the business carried on without a substantial break in time? Is the business carried on by the purchaser the same or similar to the business in the hands of the vendor? If there has been a break in the continuity of the business, what is the nature of the break and what were the reasons responsible for it? What is the length of the break? Has goodwill been purchased? Is the purchase only of some parts and the purchaser having purchased the said parts purchased some other new parts and started a business of his own which is not the same as the old business but is similar to it? These and all other relevant factors have to be borne in mind in deciding the question as to whether the purchaser can be said to be a successor-in-interest of the vendor for the purpose of industrial adjudication. It is hardly necessary to emphasise in this connection that though all the facts to which we have referred by way of illustration are relevant, it would be unreasonable to exaggerate the importance of any one of these facts or to adopt the inflexible rule that the presence or absence of any one of them is decisive of the matter one way or the other. If industrial adjudication were to insist that a purchaser must purchase the whole of the property of the vendor concern before he can be regarded as a successor-in-interest, it is quite likely that just an insignificant portion of the property may not be the subject-matter of the conveyance and it may be urged that the exclusion of the said fraction precludes industrial adjudication from treating the purchaser as a successor-in-interest. Such a plea, however, cannot be entertained for the simple reason that in deciding this question, industrial adjudication will look at the substance of the matter and not be guided solely by the form of the transfer. What we have said about the entirety of the property belonging to the vendor concern, will apply also to the goodwill which is an

1. (1957) II L. L. J. 194.

2. (1954) I L. L. J. 793.

3. A. I. R. 1958 S. C. 1026.

4. A. I. R. 1959 S. C. 208.

intangible asset of any industrial concern. If goodwill along with the rest of the tangible property has been sold, that would strongly support the plea that the purchaser is a successor-in-interest, but it does not follow that if goodwill has not been sold, that alone will necessarily show that the transferee is not a successor-in-interest. The decision of the question must ultimately depend upon the evaluation of all relevant factors and it cannot be reached by treating any one of them as of overriding or conclusive significance.

It is in the light of this legal position that the question about the character of the appellant vis-a-vis the vendor Company, has to be judged. It would be recalled that the vendor Company, sold the concern to the appellant because it was faced with the problem of recurring losses, and so, the appellant, in purchasing the concern, was not prepared to have both the advances and the outstandings included in the sale transaction. The appellant Society has been formed by the local cane growers with the object of manufacturing sugar which would suit each one of them in turn and so, the purchaser was not particularly interested in including the goodwill of the Company in the sale transaction. The exclusion of 4,000 bags of processed sugar shows that the purchaser wanted to accommodate the Company in that matter. On the other hand, the appellant has carried on the business of the Company, without an appreciable break, the business thus carried on is the same as that of the Company, the place of business is the same, and the very object of entering into the sale transaction was to enable the local cane growers to carry on the business of the Company. Therefore we are inclined to take the view that having regard to all the relevant facts in this case, the Tribunal was right in law in coming to the conclusion that the appellant is a successor-in-interest of the Company.

That takes us to the question as to what would be the nature of the appellant's liability to the employees of the Company. Before section 25-FF was introduced in the Act in 1956, this question was considered by industrial adjudication on general considerations of fair play and social justice. In all cases where the employees of the transferor concern claimed re-employment at the hands of the transferee concern, industrial adjudication first enquired into the question as to whether the transferee concern could be said to be a successor-in-interest of the transferor concern. If the answer was that the transferee was a successor-in-interest in business, then industrial adjudication considered the question of re-employment in the light of broad principles. It enquired whether the refusal of the successor to give re-employment to the employees of his predecessor was capricious and unjustified, or whether it was based on some reasonable and *bona-fide* grounds. In some cases, it appeared that there was not enough amount of work to justify the absorption of all the previous employees, sometimes the purchaser concern needed *bona fide* the assistance of better qualified and different type of workers, conceivably, in some cases, the purchaser has previous commitments for which he is answerable in the matter of employment of labour; and so the claim of re-employment made by the employees of the vendor concern had to be weighed against the pleas made by the purchaser concern for not employing the said employees and the problem had to be resolved on general grounds of fair play and social justice. In such a case, it was obviously impossible to lay down any hard and fast rules. Indeed experience of industrial adjudication shows that in resolving industrial disputes from case to case and from time to time, industrial adjudication generally avoids—as it should—to lay down inflexible rules because it is of the essence of industrial adjudication that the problem should be resolved by reference to the facts in each case so as to do justice to both the parties. It was in this spirit that industrial adjudication approached this problem until 1956 when section 25-FF was introduced in the Act. Sometimes, the claim for re-employment was allowed, or sometimes the claim for compensation was considered. But it is significant that no industrial decision has been cited before us prior to 1956 under which the employees were held entitled to compensation.

against the vendor employer as well as re-employment at the hands of the purchaser on the grounds that it was a successor-in-interest of the vendor.

It was in the background of this broad position which had evolved out of industrial adjudications that the Legislature enacted section 25-FF on September 4, 1956. As it was then inserted, section 25-FF read thus:—

“Notwithstanding anything contained in section 25-F, no workman shall be entitled to compensation under that section by reason merely of the fact that there has been a change of employers in any case where the ownership or management of the undertaking in which he is employed is transferred, whether by agreement or by operation of law, from one employer to another : Provided that—

- (a) the service of the workman has not been interrupted by reason of the transfer ;
- (b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
- (c) the employer to whom the ownership or management of the undertaking is so transferred is, under the terms of the transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.”

It may be relevant to add that this section conceivably proceeded on the assumption that if the ownership of an undertaking was transferred, the cases of the employees affected by the transfer would be treated as cases of retrenchment to which section 25-F would apply. That is why section 25-FF begins with a *non obstante* clause and lays down that the change of ownership by itself will not entitle the employees to compensation, provided the three conditions of the Proviso are satisfied. *Prima facie*, if the three conditions specified in the Proviso were not satisfied, retrenchment compensation would be payable to the employees under section 25-F; that apparently was the scheme which the Legislature had in mind when it enacted section 25-FF in the light of the definition of the word “retrenchment” prescribed by section 2(oo) of the Act.

The validity of this assumption was, however, successfully challenged before this Court in the case of *Hariprasad Shivshanker Shukla v. A. D. Divikar*.¹ In that case, this Court was called upon to consider the true scope and effect of the concept of retrenchment as defined in section 2(oo) and it held that the said definition had to be read in the light of the accepted denotation of the word, and as such, it could have no wider meaning than the ordinary connotation of the word and according to this connotation, retrenchment means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and does not include termination of services of all workmen on a *bona fide* closure of industry or on change of ownership or management thereof. In other words, the effect of this decision was that though the definition of the word “retrenchment” may perhaps have included the termination of services caused by the closure of the concern or by its transfer, these two latter cases could not be held to fall under the definition because of the ordinary accepted connotation of the said word. This decision necessarily meant that the word “retrenchment” in section 25-FF had to bear a corresponding interpretation. In that case, the employees of the Barsi Light Railway Company Ltd. had made a claim for retrenchment compensation under section 25-FF against the purchaser of the Railway Company, and the employees of the Shri Dinesh Mills Ltd. had made a similar claim against their employer on the ground that the Mills had been closed. These claims had been allowed by the Bombay High Court and the employers had come to this Court in appeal. This Court having held that the word “retrenchment” necessarily postulated the termination of the employees’ services on the ground that the employees had become surplus, allowed the appeals preferred by the employers and held

1. (1957) S. C. J. 83 : (1957) S. C. R. 121.

that the employees' claim against the purchaser in one case and against the employer who had closed his business in the other, could not be sustained. Thus as a result of this decision, it was realised that if the object of the Legislature in introducing section 25-FF was to enable employees of the transferor concern to claim retrenchment compensation unless the three conditions of the Proviso to the said section were satisfied, it could not be carried out any longer. The decision of this Court in *Hariprasad's case*¹ was pronounced on November 27, 1956.

This decision led to the promulgation of an Ordinance No IV of 1957. By this Ordinance, the original section 25 FF as it was inserted on September 4, 1956, was substantially altered. Section 25-FF as it has been enacted by the Ordinance reads thus —

"Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking, immediately before such transfer, shall be entitled to notice and compensation in accordance with the provisions of section 25 F, as if the workman had been retrenched.

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if—

- (a) the service of the workman has not been interrupted by such transfer,
- (b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer, and
- (c) the new employer is, under the terms of the transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment compensation on the basis that his service has been continuous and has not been interrupted by the transfer'.

In due course, this Ordinance was followed by Act XVIII of 1957 on June 6, 1957. By this Act, section 25-FF as it was enacted by the Ordinance has been introduced in the parent Act. It would be noticed that the Ordinance came into force retrospectively as from December 1, 1956 that is to say, three days after the judgment of this Court was pronounced in *Hariprasad's case*¹.

The Solicitor General contends that the question in the present appeal has now to be determined not in the light of general principles of industrial adjudication, but by reference to the specific provisions of section 25 FF itself. He argues, and we think rightly, that the first part of the section postulates that on a transfer of the ownership or management of an undertaking, the employment of workmen engaged by the said undertaking comes to an end, and it provides for the payment of compensation to the said employees because of the said termination of their services, provided, of course, they satisfied the test of the length of service prescribed by the section. The said part further provides the manner in which and the extent to which the said compensation has to be paid. Workmen shall be entitled to notice and compensation in accordance with the provisions of section 25-F, says the section, as if they had been retrenched. The last clause clearly brings out the fact that the termination of the services of the employees does not in law amount to retrenchment and that is consistent with the decision of this Court in *Hariprasad's case*¹. The Legislature, however, wanted to provide that though such termination may not be retrenchment technically so called, as decided by this Court, nevertheless the employees in question whose services are terminated by the transfer of the undertaking should be entitled to compensation, and so, section 25 FF provides that on such termination compensation would be paid to them as if the said termination was retrenchment. The words "as if" bring out the legal distinction between retrenchment defined by section 2 (oo) as it was interpreted by this Court and termination of services consequent upon transfer with which it deals.

In other words, the section provides that though termination of services on transfer may not be retrenchment, the workmen concerned are entitled to compensation as if the said termination was retrenchment. This provision has been made for the purpose of calculating the amount of compensation payable to such workmen; rather than provide for the measure of compensation over again, section 25-FF makes a reference to section 25-F for that limited purpose, and, therefore, in all cases to which section 25-FF applies, the only claim which the employees of the transferred concern can legitimately make is a claim for compensation against their employers. No claim can be made against the transferee of the said concern.

The scheme of the Proviso to section 25-FF emphasises the same policy. If the three conditions specified in the Proviso are satisfied, there is no termination of service either in fact or in law, and so, there is no scope for the payment of any compensation. That is the effect of the Proviso. Therefore, reading section 25-FF as a whole, it does appear that unless the transfer falls under the Proviso, the employees of the transferred concern are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking. Thus, the effect of the enactment of section 25-FF is to restore the position which the Legislature had apparently in mind when section 25-FF was originally enacted on September 4, 1956. By amending section 25-FF, the Legislature has made it clear that if industrial undertakings are transferred, the employees of such transferred undertakings should be entitled to compensation, unless, of course, the continuity in their service or employment is not disturbed and that can happen if the transfer satisfies the three requirements of the Proviso.

In this connection, it is necessary to point out that even before section 25-FF was introduced in the Act for the first time, when such questions were considered by industrial adjudication on general grounds of fair play and social justice, it does not appear that employees of the transferred concern were held entitled to both compensation for termination of service and immediate re-employment at the hands of the transferee. The present position which results from the enactment of section 25-FF, as amended, is, therefore, substantially the same as it was at the earlier stage. It is common ground that if a transfer is fictitious or 'benami', section 25-FF has no application at all. In such a case, there has been no change of ownership or management and despite an apparent transfer, the transferor employer continues to be the real employer and there has to be continuity of service under the same terms and conditions of service as before and there can be no question of compensation.

Mr. Chari, however, urges that the present case ought to be governed by the provisions of section 25-H of the Act. This argument proceeds on the assumption that the case of termination of service resulting from the transfer of ownership or management of an undertaking to which section 25-FF applies is a case of retrenchment properly so-called. In our opinion, this assumption is clearly not well-founded. The first difficulty in accepting the correctness of this assumption is the decision of this Court in *Hariprasad's case*¹, to which we have already referred. The decision of this Court in that case clearly shows that the termination of services resulting from transfer or closure is not retrenchment, and it is on the basis of the correctness of this decision that section 25-FF as amended has been enacted. Besides, on a construction of section 25-FF itself, it is difficult to equate the termination of services with which it deals, with retrenchment covered by section 25-F. As we have already indicated, section 25-F is referred to in section 25-FF to enable the assessment of compensation payable to the employees covered by section 25-FF. The clause 'as if' clearly shows the distinction between retrenchment under section 2 (oo) and termination of service under

section 25-FF. In this connection, we may refer to the decision of this Court in *M/s Hatsingh Manufacturing Co., Ltd v Union of India*¹. In that case, this Court had to consider the effect of the words "as if" occurring in section 25-FF, and it has been held that by the use of the words 'as if' the workmen had been retrenched" under the said section, the Legislature has not sought to place closure of an undertaking on the same footing as retrenchment under section 25 F. Therefore, the plea that section 25-H applies to the present case cannot be accepted.

Mr Chari then argued that though in terms section 25-H may not apply to the present case, the general principle underlying the provisions of the said section should be invoked in dealing with the claim made by the respondents against the appellant. His argument is that too much emphasis should not be placed on the identity of the individual employer in dealing with the present question and he suggested that what is important to bear in mind is the identity of the undertaking which was run by the vendor before and which is run by the vendee now. If the undertaking is the same, there is no reason why the workmen should not be entitled to claim continuity of service in the said undertaking. In our opinion, this argument is misconceived. Once we reach the conclusion that in the case of a transfer of any undertaking the Legislature has by section 25 FF provided for payment of compensation to the employees on the clear and distinct basis that their services have been terminated by such transfer, it is difficult to see how any questions of fair play or social justice would justify the claim by the respondents that they ought to be re-employed by the appellant. It is true that in cases falling under section 25 F, workmen may get retrenchment compensation and they may yet be able to claim re-employment under section 25 H and in that sense, some workmen may get both retrenchment compensation and re employment. That is no doubt the effect of reading section 25-F and section 25-H together. But it must be borne in mind that in the case of retrenchment, the undertaking continues and only some workmen are discharged as surplus and it is the problem of re employment of this small number of discharged workman that is tackled by section 25-H. Besides, under section 25-H, a discharged workman may not be entitled to claim re-employment immediately after retrenchment or even soon thereafter. It is only if the employer who discharged him as surplus requires additional workmen that his opportunity may occur. In the present case however, the position is entirely different. As soon as the transfer is effected under section 25-FF, all employees are entitled to claim compensation, unless, of course, the case of transfer falls under the Proviso, and if Mr Chari is right, these workmen who have been paid compensation are immediately entitled to claim re-employment from the transferee. This double benefit in the form of payment of compensation and immediate re-employment cannot be said to be based on any considerations of fair play or justice. Fair play and justice obviously mean fair play and social justice to both the parties. It would, we think, not be fair that the vendor should pay compensation to his employees on the ground that the transfer brings about the termination of their services, and the vendee should be asked to take them back on the ground that the principles of social justice require him to do so. In this connection, it is relevant to remember that the industrial principle underlying the award of retrenchment compensation is as observed by this Court in the case of *The Indian Hume Pipe Co Ltd v The Workmen & Anr*² "to give partial protection to workmen who are thrown out of employment for no fault of their own, to tide over the period of unemployment", and in that sense, the said compensation is distinguishable from gratuity. Therefore, if the transferor is by statute required to pay retrenchment compensation to his workmen, it would be anomalous to suggest that the workmen who received compensation are entitled to claim immediate re-employment in the concern at the hands of the transferee. The contention that in cases of this kind, the workmen must get retrenchment compensation and re-

1 (1961) S.C.J. 22 = (1960) 3 S.C.R. 528

2 (1960) S.C.J. 550 = (1960) 2 S.C.R. 32.

employment almost simultaneously is inconsistent with the very basis of the concept of retrenchment compensation. We are, therefore, satisfied that the general principles of social justice and fair play on which this alternative argument is based do not justify the claim made by the respondents.

In the result, the appeal is allowed and the award is set aside. There would be no order as to costs.

V. S.

Appeal allowed.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL, AND J. R. MUDHOLKAR, JJ.

The Bank of Bihar

. . Appellant*

v.

Mahabir Lal and others

. . Respondents.

Negotiable Instruments Act (XXVI of 1881), section 85—Liability—When can be fastened—Practice—Statements of a Court in Judgments as to what happened or did not happen before it—When can be challenged.

Master's liability for act of servants.

For the application of section 85 of the Negotiable Instruments Act, 1881, it had to be established that payment had in fact been made to the firm (defendants) or to a person on behalf of the firm. In the instant case, the money for which the cheque was drawn by the firm on the Bank (Plaintiff) not having passed into the actual custody of the firm or that of the custody of a person who was a servant or agent of the firm the firm cannot be held liable for it. Payment to a person who had nothing to do with the firm or a payment to an agent of the Bank would not be a payment to the firm.

Where a statement appears in the Judgment of a Court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless of course both the parties to the litigation agree that the statement is wrong or the Court itself admits that the statement is erroneous.

If a third party sustains damage or loss by reason of an act of the servant, he can hold the servant liable and also if the servant's act falls within the scope of his duties or authority, the master as well. That principle can obviously have no application for founding a liability against a stranger from whom the servant can in no sense be regarded as deriving any authority.

Appeal from the Judgment and Decree, dated 11th March, 1958, of the Patna High Court in First Appeal No. 230 of 1950.

Sarjoo Prasad, Senior Advocate (*R. C. Prasad*, Advocate, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*M. K. Ramamurthi*, *R. K. Garg*, *S. C. Agarwala* and *D. P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondents No. 1.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by a certificate granted by the Patna High Court allowing the appeal preferred before it by the defendants 1 and 2 and dismissing the claim of the plaintiff Bank (the appellant before us) for a sum of Rs. 35,000.

According to the Bank, defendants 1 and 2 carried on business at Bihar Sharif under the name and style of *M/s. Jogilal Prabhu Chand*. On February 17, 1941, they executed a cash credit agreement in favour of the Bank under which cash credit facilities were sanctioned upto a limit of Rs. 50,000 against cloth bales on certain terms. Under that agreement a sum of Rs. 15,000 was advanced to the Firm on that very day. On August 28, 1947, the Firm executed a promissory

* C. A. No. 340 of 1960.

7th February, 1963..

note in favour of the Bihar Sharif Branch of the Bank for Rs 50,000 and approached the Manager for immediate advance of Rs 35,000 as they required that amount for paying the price of certain cloth allotted to them by M/s Manohardass Jainarain, wholesale dealers of Patna. Then according to the Bank, an arrangement was entered into between the Firm and the Manager of the Bihar Sharif Branch of the Bank under which the Firm was allowed to draw on the security of the promissory note on its agreeing to pledge the bales of cloth as further security after they were received from the wholesalers. On the basis of this agreement, the Firm drew a cheque for Rs. 35,000 on August 29, 1947, in favour of the second defendant, which was, according to the Bank, actually passed for payment by the Manager of the Bihar Sharif Branch of the Bank and the amount was paid to the second defendant. Further, according to the Bank, on August 30, 1947, a "false and mischievous" telegram purporting to be from defendant No 2, Mahabir Lal, was received by the Manager of the Bihar Sharif Branch of the Bank saying that the Potdar of the Bank who was sent along with him with the money by the Manager had not deposited it and that the Potdar could not be traced. The telegram contained a further request that the amount of Rs 35,000 be made available to the firm immediately. On September 1, 1947, the Manager informed the Firm that the allegations in the telegram were altogether false. On September 9 1947, the Manager received a letter signed by Mahabir Lal alleging that in collusion with the Potdar he (the Manager) had misappropriated the sum of Rs 35,000. These allegations are said by the Bank to be false and the suit out of which this appeal arises was instituted for the recovery of the amount for which the cheque was drawn by the Firm on August 29, 1947 and actually cashed by the Manager.

The defendants denied the claim of the Bank as false. According to them, the suit was a counter-blast to a criminal case instituted by them against the Manager and the Potdar of the Bihar Sharif Branch of the Bank charging them with misappropriation. While the defendants admitted that they had made arrangements with the Bihar Sharif Branch of the Bank for a loan of Rs 35,000 as alleged by the Bank for taking delivery of 42 bales of cloth which had been allotted to them by M/s Manohardass Jainarain wholesale dealers of Patna, they contended that the second defendant was informed that under the rules the Bank could advance a loan only upon the goods actually kept in the custody of the Bank. They further alleged that the Manager said that in order to oblige the Firm he was prepared to advance Rs 35,000 provided certain conditions were fulfilled. Those conditions were (1) that the Firm should execute a loan bond as well as a promissory note for Rs 50,000 as further security, (2) that the firm should draw a cheque for Rs 35,000 endorsed to self, (3) that the second defendant should further agree that instead of taking the amount in cash with himself he should let the amount be sent by the Manager Mr Kapur, through Ram Bharosa Singh, Potdar of the Bank for being paid to M/s Manohardass Jainarain and (4) that after paying the amount the said Potdar would take delivery of the bales of cloth allotted to the Firm and bring them to the premises of the Bank at Bihar Sharif where they would remain pledged until the loan was repaid.

The Firm thus denied that the sum of Rs 35,000 was actually paid or advanced to them by the Manager of the Bihar Sharif Branch of the Bank. According to the Firm, a cheque was drawn at 5 00 A.M. on the next morning and after it was handed over to Mr Kapur, he went inside the treasury of the Bank along with the Potdar and returned with something wrapped in a *gamcha* and tied it round the waist of the Potdar and said that the latter would hand over the money to M/s Manohardass Jainarain, take delivery of the goods and bring them to the premises of the Bank where they would be kept in pledge. Thereafter the Potdar and the second defendant along with one Mahadeo Ram, a servant of the Firm left for Patna by bus. On reaching the *ekka* stand of Patna, the Potdar asked the second defendant to proceed to the premises of

M/s. Manohardass Jainarain saying that as he had to go to the Patna City Branch of the Bihar Bank, he would follow later. He assured the second defendant that he would bring along with him the sum of Rs. 35,000. The second defendant then went to the premises of M/s. Manohardass Jainarain and waited for the Potdar to turn up. As he did not come within a reasonable time, he went to the Patna City Branch of the Bank only to discover that the Potdar was not there either. It was after this that the telegram mentioned in the plaint was sent to Mr. Kapur and a report lodged with the Police at Patna. The second defendant says that on his return to Bihar Sharif on August 30, he saw Mr. Kapur and told the whole story to him whereupon Mr. Kapur said that he should not worry and that he would see to it that the bales were released soon by M/s. Manohardass Jainarain. Nothing, however, happened and, therefore, the defendants filed a criminal complaint against Mr. Kapur as well as the Potdar. Eventually, however, the complaint filed by the defendants failed.

In its judgment the trial Court has said :

"Moreove even if it be accepted for the sake of argument that Ram Bharosa Singh went with the money along with Mahabir Lal as alleged according to the term of the contract he would be deemed to be a temporary servant of Mahabir Lal for that purpose which fact is evident from the defendants' evidence also as according to their evidence Mahabir Lal met the cost of his Nashta (breakfast) and fare of the bus.

Apparently because of this, when the Firm's appeal was being argued before the High Court, the Bank's counsel Mr. B. C. De conceded that Ram Bharosa Singh, Potdar, did take the money to Patna where he went along with the second defendant, which implies that the defendant No. 2 was not actually paid the amount for which the cheque was drawn by the Firm. In this connection we would quote the following statement appearing in the judgment of the High Court :

"Mr. B. C. De, who appeared for the plaintiff conceded at the outset that, in fact, Ram Bharosa Singh, Potdar, had taken the money to Patna City to pay to the Firm of Manohardass Jainarain as is the case of the contesting defendants. He, however, urged that, even then, the defendants would be liable for the claim of the plaintiff. He urged that Rs. 35,000 had gone out of the coffers of the Bank against the cheque for Rs. 35,000 issued by the defendants. The Bank was, therefore, not responsible as to who, in fact, got the money after it was duly presented and honoured by the Bank."

The High Court then pointed out that Mr. De placed reliance upon certain decisions of the Calcutta and Bombay High Courts and section 85 of the Negotiable Instruments Act. Before us, however, it is urged on behalf of the Bank that no such concession was made by Mr. De. The second defendant has filed an affidavit which counters the statement made on behalf of the Bank. In our opinion where a statement appears in the judgment of a Court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless of course both the parties to the litigation agree that the statement is wrong, or the Court itself admits that the statement is erroneous. If the High Court had proceeded on an erroneous impression that Mr. De had conceded that the money was taken along with him by Ram Bharosa Singh to Patna, there was nothing easier for the Bank than to prefer an application for review before the High Court after the judgment was pronounced or if the judgment was read out in Court immediately draw the attention of the Court to the error in the statement. Nothing of the kind was done by the Bank. It is too late for the Bank now to say that the statement was wrong. It appears to have been argued on behalf of the Bank in the trial Court alternatively that even on the assumption that the money was taken to Patna by Ram Bharosa Singh, the suit must be decreed. We, therefore, see nothing strange in Mr. De making a concession of the kind attributed to him by the High Court. In the circumstances we decline to go behind what is contained in the judgment of the High Court, quoted earlier.

The next question is whether the sum of Rs. 35,000 could be said to have been paid by the Bank to the Firm. Upon the admitted position that the amount of Rs. 35,000 was not actually received by the Firm in the sense that it was not

handed over to the second defendant who had presented the cheque, could it be said that it must be deemed to have been paid to the Firm since it was handed over to the Potdar for taking it to Patna? It is no doubt true that the Potdar did accompany the second defendant to Patna but it is difficult to hold that he being a servant or an agent of the Bank could also be said to have been constituted by the Firm as its agent for carrying the money to Patna. It is not the Bank's case that it was at the suggestion of the defendant No. 2 that the money was handed over to the Potdar. Perhaps it was not the normal duty of a Potdar to carry money on behalf of the Bank for payment to a party at its place of business. But even if it is not, we cannot overlook the fact that the arrangement which was arrived at between the Firm and Mr. Kapur was also an unusual one. Mr. Kapur admittedly had no authority to pay Rs. 35,000 to the Firm before the goods or documents of title relating to the goods were placed in the custody of the Bank. Since Mr. Kapur wanted to help the Firm without at the same time breaking the rules of the Bank, what he must have intended in handing over the money to the Potdar was to constitute him as the agent of the Bank for the purpose of paying the money to the Firm of Manohardass Jainarain and taking simultaneously delivery of the goods and documents of title relating to the goods from that Firm. There would have been no point in the Potdar accompanying the second defendant to Patna and carrying money along with him if he were not to be the agent of the Bank. It is the Firm's case that the second defendant did not go alone to the Bank on the morning of August 29, but that he went along with his servant Mahadeo. Two of them being together, they could surely not have wanted a third person to go along with them just for carrying the cash. We are therefore, of the opinion that the money not having passed into the actual custody of the Firm or that of the custody of a person who was a servant or agent of the Firm, the Firm cannot be held liable for it.

In regard to section 85 of the Negotiable Instruments Act, 1881 (XXVI of 1881) and the decision of *Jugivandas Jamnadas v The Nagar Central Bank Ltd.*¹, which is founded on that section upon which reliance was placed before the High Court, it is sufficient to say that before the provisions of section 85 can assist the Bank, it had to be established that payment had in fact been made to the Firm or to a person on behalf of the Firm. Payment to a person who had nothing to do with the Firm or a payment to an agent of the Bank would not be a payment to the Firm. Section 118 of the Negotiable Instruments Act, on which also reliance was placed before us does not have any bearing upon the case at all.

It was then urged on behalf of the Bank that even assuming that the money was misappropriated by the Potdar the Bank could not be held responsible for his act because his act was a criminal act. In support of this contention the learned counsel relied upon the decisions in *Gopal Chandra Bhattacharjee v The Secretary of State of India*² and *Cheshire v Bailey*³. The rule of law upon which these decisions are based is that the liability of the master for the misconduct of the servant extends only to the fraud of his servant committed in the course of his employment and for the master's benefit and that a master is not liable for the misconduct of the servant committed for the servant's own private benefit. It is difficult to appreciate how these cases are of any assistance to the Bank. Here, what the Bank wants to do is to fasten liability upon the Firm with respect to the amount for which it had drawn a cheque. Before the Firm could be made liable, the amount for which the cheque was drawn had to be shown to have been paid to the Firm. On the contrary it was handed over by the Bank to its Potdar avowedly with the object of paying it to the firm of Manohardass Jainarain, but was not in fact so paid by him. Assuming that he misappropriated the money how can the Bank seek to

1 (1925) I.L.R. 50 Bom 118

3 L.R. (1905) 1 KB 237

2 (1909) I.L.R. 36 Cal 647

hold the Firm of the defendants liable? This is not a case where the defendants are seeking to hold the Bank liable for a criminal act of one of its servants or employees. But it is a case where the Bank wants to fasten liability on the Firm for the criminal act of the Banks's own servant. Such a proposition is unsupportable in law. For vicarious liability may, in appropriate cases, rest on the master with respect to his servant's acts but it cannot possibly rest on a stranger with respect to the criminal acts of a servant of another. The principle on which the master's liability for certain acts of the servants rests is that the servant, when he commits such act, acts within the scope of his authority. If the servant was not acting within the scope of his authority, the master would not be liable and it is the person who did the particular act, that is, the servant, would alone be liable. If a third party sustains damage or loss by reason of an act of the servant, he can hold the servant liable and also if the servant's act falls within the scope of his duties or authority, the master as well. That principle can obviously have no application for founding a liability against a stranger from whom the servant can in no sense be regarded as deriving any authority. We are, therefore, clear that whether the money had been misappropriated, by the Potdar or by the Manager, it is the Bank who is their employer that must bear the loss. The drawers of the cheque, that is, the Firm to whom no part of the money was paid by the Bank cannot be held liable to make it good to the Bank. For these reasons we affirm the decree appealed from and dismiss the appeal with costs.

K. L. B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR AND K. C. DAS GUPTA, JJ.

Vasumatiben Gaurishankar Bhatt

.. Appellant*

v.

Naviram Manchharam Vora and others

.. Respondents.

Bombay Rents Hotel and Lodging House Rates Control Act (LVII of 1947) as amended by Act (LXI of 1953)—Section 12 (3) (a)—Scope and effect.

What section 12 (3) (a) of the Bombay Rent Control Act requires is that in cases where there is no dispute between the landlord and the tenant regarding the amount of standard rent or permitted increases, if the landlord is able to show that the tenant is in arrears for a period of six months or more and the said arrears continued in spite of the fact that a notice was served on him before the institution of the suit and no payment was made within a month thereafter, the landlord is entitled to a decree for ejectment against the tenant. Section 12 (3) (a) refers to a notice, but in terms, it refers to a notice served by the landlord as required by section 12 (2), and in section 12 (2) the Legislature has made no amendment when it amended sub-section (3) in 1953. Section 12 (2) never required the landlord to state to the tenant what the consequences would be if the tenant neglected to pay the arrears demanded by the notice. If notice has been served as required by section 12 (2) and the tenant is shown to have neglected to comply with the notice until the expiration of one month thereafter section 12 (2) is satisfied and section 12 (3) (a) comes into operation.

Section 12 (3) (a) before amendment cannot be said to confer any right or vested right on the tenant to pay the arrears at the hearing of the suit.

The plain meaning of section 12 (3) (a) as amended is that if notice is served on the tenant and he has not made the payment as required within the time specified in section 12 (3) (a) the Court is bound to pass a decree for eviction of the tenant.

Appeal by Special Leave from the Judgment and Order dated 17th December, 1962, of the Gujarat High Court in Civil Revision Application No. 175 of 1960.

G. B. Pai, Advocate, and O. C. Mathur, J. B. Dadachanji, and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Appellant.

M. S. K. Sastri and M. S. Narasimhan, Advocates, for Respondents Nos 1 and 2.

The Judgment of the Court was delivered by

Gajendragadkar, J—This appeal by Special Leave raises a short question about the construction and effect of section 12 (3) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (LVII of 1947) (hereinafter called 'the Act'). The appellant has been tenant of one room in a residential building known as Lalbang situated in Badekhan's Chakla in the City of Surat since 18th October 1935. Under the rent note, she is required to pay a monthly rent of Rs 18/-. On 12th October, 1949, respondents 1 and 2 purchased the said property. It appears that on 21st November, 1950, they served a notice on the appellant to vacate the premises let out to her on the ground that she was in arrears of rent from 1st July, 1950. On receiving the said notice, the appellant paid a part of the rent, but again fell into arrears, and so, the respondents served a second notice on her on 7th February, 1951, claiming arrears from 1st October, 1950. The appellant did not vacate the premises nor did she pay all the arrears due from her. A third notice was accordingly served on her on 27th March, 1953, in which the respondents claimed to recover arrears from 1st January, 1951, that is to say, arrears for two years and two months. A few days after this notice was served, section 12 (3) of the Act was amended by the Bombay Amending Act (LXI of 1953), and the amendment came into force on the 31st March, 1954. The respondents then filed the present suit against the appellant on 12th April, 1954, in which they asked for a decree for eviction against the appellant on the ground that they wanted the premises let out to the appellant *bona fide* for their personal use, and that the appellant was in arrears for more than six months. This suit was resisted by the appellant on several grounds. Pending the hearing of the suit, the appellant paid by instalments in all Rs 1,470 before the date of the decree, so that at the date when the decree was passed, no arrears were due from her.

The learned trial Judge upheld both the pleas made by the respondents and passed a decree for eviction against the appellant. He held that the respondents reasonably and *bona fide* required the property for their personal use and that the appellant was in arrears of rent for more than six months. This decree was challenged by the appellant by an appeal preferred before the District Court at Surat. The learned District Judge held that the respondents had failed to prove that they needed the premises reasonably and *bona fide* for their personal use, but he accepted their case that the appellant was in arrears of rent for more than six months and that the suit fell within the scope of section 12 (3) (a) of the Act. That is how the decree passed by the trial Court was confirmed in appeal. The appellant then challenged the correctness of this decree by a revisional petition filed before the Gujarat High Court. This petition ultimately failed and the decree passed against her was confirmed. It is against this decision that the appellant has come to this Court, and on her behalf, Mr. Pai has contended that the High Court was in error in holding that the requirements of section 12 (3) (a) as amended justified the passing of the decree against the appellant.

It appears that section 12 of the Act has been amended from time to time. Before the Amending Act LXI of 1953, came into force, the said section read thus:

* 12 (1)—A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

(2) No suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in section 106 of the Transfer of Property Act, 1882.

(3) No decree for eviction shall be passed in any suit if, at the hearing of the suit, the tenant pays or tenders in Court the standard rent or permitted increases then due together with the costs of the suit."

The *Explanation* to this section dealt with cases where there was a dispute between the landlord and the tenant in regard to the amount of the standard rent. With that *Explanation* we are not concerned in the present appeal.

It appears that the Bombay High Court interpreted the words "at the hearing of the suit" in section 12 (3) as including the hearing of the appeal arising from the suit, and so, it was held that under section 12 (3) of the Act, an appeal Court cannot confirm a decree for eviction if before the passing of the order in appeal, the tenant pays or tenders in Court the standard rent or permitted increases then due together with the costs of the suit and also appeal, vide *Dayaram Kashiram Shimpi v. Banshilal Raghunath Marwari*.¹ After section 12 (3) was amended by the Amending Act LXI of 1953, the words "at the hearing of the suit" were construed by the Bombay High Court to mean that the application which the tenant can make offering to deposit the arrears due from him must be made before the Court of first instance and cannot be reserved to be made in the Court of appeal, vide *Laxminarayan Nandkishore Shravagi v. Keshardev Baijnath Narsaria*.²

There is one more decision of the Bombay High Court to which reference must be made before dealing with the points raised for our decision in the present appeal. In *Kurban Thussen Sajauddin v. Ratikant Nilkant and another*³ it was held that the word "may" used in section 12 (3) (a) as amended really meant "must" and that in cases where the conditions of the said provision were satisfied, the Court had to pass a decree for the recovery of possession in favour of the landlord. It is in the light of these decisions that we have to consider the contention of the appellant that under section 12 (3) (a) as amended, it was not open to the Court to pass a decree for ejectment against her in the present proceedings.

On behalf of the appellant Mr. Pai has emphasised the fact that the provisions of section 12, sub-sections (1) and (2) are mandatory and there can be no doubt that they imposed severe restrictions on the landlord's right to sue the tenant in ejectment. He, therefore, contends that in construing the effect of section 12 (3) (a), we must bear in mind the fact that the Legislature has enacted the present statute and particularly the provisions of section 12 with a view to protect the interests of the tenant. He further contends that it cannot be disputed that before section 12 (3) (a) was amended, it was open to the tenant to pay the arrears at any time during the pendency of the suit, or even during the pendency of the appeal, and so, when the tenant failed or neglected to pay the arrears due from him immediately after receiving the notice of demand from the landlord, it is easy to imagine that she knew that her failure to pay the arrears of rent immediately on receiving the notice would not lead to her eviction and that she would have the option to deposit the amount as required by section 12 (3) either in the trial Court or in the Court of Appeal. That being so, he suggests that in order to avoid hardship to the tenant, section 12 (3) (a) should be read as requiring the landlord to issue a fresh notice after the amended section came into force. The notice given by the landlord prior to the date of the amendment did not convey to the tenant the knowledge that her failure to comply with it would necessarily lead to her ejectment, and so, the relevant provisions of this beneficent statute should be construed in a liberal way. That, in substance, is the first contention raised by Mr. Pai before us.

We are unable to accept this argument. What section 12 (3) (a) requires is that in cases where there is no dispute between the landlord and the tenant regarding the amount of standard rent or permitted increases, if the landlord is able to show that the tenant is in arrears for a period of six months or more and the said arrears

1. 55 Bom. L.R. 30.

2. 58 Bom. L.R. 1041.

3. A.I.R. 1959 Bom. 401.

continued in spite of the fact that a notice was served on him before the institution of the suit and no payment was made within a month thereafter, the landlord is entitled to get a decree for ejectment against the tenant. It is true that section 12 (3) (a) refers to a notice but in terms, it refers to a notice served by the landlord as required by section 12 (2), and in section 12 (2) the Legislature has made no amendment when it amended sub-section (3). If we turn to section 12 (2), it would be noticed that the notice given by the respondents to the appellant in the present case satisfies the requirements of the said sub-section. The respondents told the appellant by their notice that arrears were due from her, and there is no doubt that the arrears were not paid up by the appellant until the expiration of one month next after the notice in writing was served on her in that behalf. Section 12 (2) never required the landlord to state to the tenant what the consequences would be if the tenant neglected to pay the arrears demanded from him/her by the notice. Therefore if the notice served by the respondents on the appellant prior to the institution of the present suit is in order and it is shown that the arrears have not been paid as required, then section 12 (2) has been complied with, and it is on that footing that the case between the parties has to be tried under section 12 (3) (a).

Mr. Pai then contends that section 12 (3) (a) seems to suggest that the neglect or failure of the tenant to make the payment of arrears must be subsequent to the date on which the Amending Act came into force. He relies on the fact that section 12 (3) (a) refers to the case where the tenant "neglects to make payment" of the rent. The section does not say "has neglected to make payment" says Mr. Pai. In our opinion, there is no substance in this argument. The use of the word "neglect" in the present tense has to be construed in the light of the fact that the clause refers to the tenant neglecting to make payment of the rent until the expiration of one month next after receipt of the notice, and that clearly, would have made the use of the past tense inappropriate. The position therefore, is that if notice has been served as required by section 12 (2) and the tenant is shown to have neglected to comply with the notice until the expiration of one month thereafter, section 12 (2) is satisfied and section 12 (3) (a) comes into operation.

Mr. Pai also argued that the right given to the tenant to pay the arrears at the hearing of the suit was a vested right, and so, in construing section 12 (3) (a) we should not adopt the construction which would defeat that vested right. It is not easy to accept the contention that the provisions of section 12 (3) (a) really confer any vested right as such on the tenant. What section 12 (3) (a) provided was that a decree shall not be passed in favour of the landlord in case the tenant pays or tenders in Court the standard rent at the hearing of the suit. This provision cannot *prima facie* be said to confer any right or vested right on the tenant. But even if the tenant had a vested right to pay the money in Court at the hearing of the suit, we do not see how that consideration can alter the plain effect of the words used in section 12 (3) (a). The suit was filed after the amended section came into force, and clearly the amended provision applies to the suit and governs the decision of the dispute between the parties. If that is so, the plain meaning of section 12 (3) (a) is that if a notice is served on the tenant and he has not made the payment as required within the time specified in section 12 (3) (a), the Court is bound to pass a decree for eviction against the tenant. That is the view taken by the Gujarat High Court and we are satisfied that view clearly gives effect to the provisions of section 12 (3) (a) as amended in 1953. We must accordingly hold that there is no substance in the appeal. The appeal, therefore, fails and is dismissed with costs.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction).

PRESENT :—B.P. SINHA, *Chief Justice* K.N. WANCHOO, RAGHUBAR DAYAL,
N. RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAR, JJ.

Ram Sarup

... Petitioner*

v.

The Union of India and another

... Respondents.

Army Act (XLVI of 1950), section 69—Member of the Armed Forces charged with offence under section 69 of the Act and section 302 of the Penal Code (XLV of 1860)—Trial and death sentence by General Court-Martial—Verdict of votes—Oral and unrecorded under the Army Rules—Allegation of inadequate majority—No basis for section 164 of the Act—Confirmation of sentence by two authorities—Central Government, the final authority—Confirmation by Central Government in the first instance itself—Effect—Act enacted as empowered by Article 33 of the Constitution—Modification of Fundamental Rights in regard to members of armed forces—Any provision of the Act saved under Article 33 of the Constitution—Section 125—Trial by Criminal Courts or by Court-Martial—Discretion with the military authority—No question of infringement of Article 14 of the Constitution in view of Article 33 of the Constitution—No violation on merits also—Discretion guided by principles and controlled by Central Government.

Under the procedure laid down in the Army Rules, 1954 only the members of the Court-Martial and the Judge-Advocate can know how the members of the Court-Martial gave their votes of verdict. No record is made of them. The allegation that the death sentence was voted by an inadequate majority cannot be based on any definite knowledge.

The certificate by the presiding officer of the Court-Martial that the sentence of death is passed with the concurrence of at least two-third of the members of the Court is not recorded in pursuance of any provision governing the proceedings of the Court-Martial. It is recorded in view of the satisfaction of the confirming authority only.

Section 164 does not lay down that the correctness of the order of sentence of the Court-Martial is always to be decided by two higher authorities. It only provides for two remedies, a petition to the authority which is empowered to confirm the sentence and a petition to the Central Government or some other officer mentioned in the section after the sentence is confirmed by the former authority.

If the Central Government itself exercised the power of confirmation of the sentence awarded to a person as laid down in section 164 (2) as the highest authority, there could be no occasion for a further appeal to any other body. No justifiable grievance can be made of the fact that the person had no occasion to go to any other authority with a second petition as he could possibly have done in case the order of confirmation was by any authority subordinate to the Central Government.

The Act has been enacted in the exercise of the power conferred on Parliament under Article 33 of the Constitution to modify the fundamental rights guaranteed by Part III, in their application to the armed forces. If any of the provisions of the Act is not consistent with any of the provisions of any of the Articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those articles in their application to the person subject to the Act. Any such provision in the Act is as much law as the entire Act.

Section 125 of the Act, empowering the officer mentioned in the section to decide whether the accused person would be tried by a Court-Martial or by a Criminal Court, cannot, even on merits, be said to infringe the provisions of Article 14 of the Constitution.

There is sufficient material in the Act which indicates the policy which is to be a guide for exercising the discretion and it is expected that the discretion is exercised in accordance with it. Magistrates can question it and the Government, in case of difference of opinion between the views of the Magistrate and the Army authorities, decide the matter finally.

The authorities are to be guided by considerations of the exigencies of service, maintenance of discipline, speedier trial, the nature of the offence and the person against whom the offence is committed.

According to section 549 of the Criminal Procedure Code and the Rules framed thereunder, the final choice about the forum of the trial of person accused of a civil offence rests with the Central Government, whenever there be difference of opinion between a Criminal Court and the military authorities about the forum where an accused is to be tried for the particular offence committed by him. His position under sections 125 and 126 of the Act is also the same.

Petition under Article 32 of the Constitution of India for the enforcement of fundamental rights.

O.P. Rana, Advocate (*Amicus curiae*), for Petitioner. (Petitioner was also produced and present).

G.K. Daphtary, Attorney-General for India (B.R. L. Iyengar and R.H. Dhebar, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by E. M.

Raghubar Dayal J—Ram Sarup, petitioner, was a sepoy in 131 Platoon DSC, attached to the Ordinance Depot, Shakurbasti. As a sepoy, he is subject to the Army Act 1950 (XLVI of 1950), hereinafter called the Act.

On 13th June 1962, he shot dead two sepoys, Sheotaj Singh and Ad Ram and one Havildar Pala Ram. He was charged on three counts under section 69 of the Act read with section 302 Indian Penal Code and was tried by the General Court-Martial. On 12th January, 1963, the General Court Martial found him guilty of the three charges and sentenced him to death.

The Central Government confirmed the findings and sentence awarded by the General Court Martial to the petitioner. Thereafter, the petitioner has filed this Writ Petition praying for the issue of a writ in the nature of a writ of *habeas corpus* and a writ of *certiorari* setting aside the order dated 12th January, 1963 of the General Court Martial and the order of the Central Government confirming the said findings and sentence for his release from the Central Jail, Tehar, New Delhi where he is detained pending execution of the sentence awarded to him.

The contentions raised for the petitioner are (1) That the provisions of section 125 of the Act are discriminatory and contravene the provisions of Article 14 of the Constitution inasmuch as it is left to the unguided discretion of the officer mentioned in that section to decide whether the accused person would be tried by a Court Martial or by a Criminal Court. (2) Section 127 of the Act which provides for successive trials by a Criminal Court and a Court Martial, violates the provisions of Article 20 of the Constitution as it provides for the prosecution and punishment of a person for the same offence more than once. (3) The petitioner was not allowed to be defended at the General Court Martial by a legal practitioner of his choice and therefore there had been a violation of the provisions of Article 22 (1) of the Constitution. (4) The procedure laid down for the trial of offences by the General Court Martial had not been followed inasmuch as the death sentence awarded to the petitioner was not passed with the concurrence of at least two-thirds of the members of the Court. (5) Section 164 of the Act provides two remedies, one after the other, to a person aggrieved by any order passed by a Court-Martial. Sub-section (1) allows him to present a petition to the officer or authority empowered to confirm any finding or sentence of the Court Martial and sub-section (2) allows him to present a petition to the Central Government or to any other authority mentioned in that sub-section and empowers the Central Government or the other authority to pass such order on the petition as it thinks fit. The petitioner could avail of only one remedy as the finding and sentence of the Court-Martial was confirmed by the Central Government. He, therefore, could not go to any other authority against the order of the Central Government by which he was aggrieved.

It will be convenient to deal with the first point at the end and take up the other points here.

The petitioner has not been subjected to a second trial for the offence of which he has been convicted by the General Court-Martial. We therefore do not consider it necessary to decide the question of the validity of section 127 of the Act in this case.

With regard to the third point, it is alleged that the petitioner had expressed his desire, on many occasions, for permission to engage a practising civil lawyer to represent him at the trial but the authorities turned down those requests and told him that it was not permissible under the Military rules to allow the services of a civilian lawyer and that he would have to defend his case with the counsel he would be provided by the Military Authorities. In reply, it is stated that this allegation about the petitioner's requests and their being turned down was not correct, that it was not made in the petition but was made in the reply after the State had filed its counter-affidavits in which it was stated that no such request for his repre-

sensation by a legal practitioner had been made and that there had been no denial of his fundamental rights. We are of opinion that the petitioner made no request for his being represented at the Court-Martial by a counsel of his choice, that consequently no such request was refused and that he cannot be said to have been denied his fundamental right of being defended by a counsel of his choice.

In paragraph 9 of his petition he did not state that he had made a request for his being represented by a counsel of his choice. He simply stated that certain of his relatives who sought interview with him subsequent to his arrest were refused permission to see him and that this procedure which resulted in denial of opportunity to him to defend himself properly by engaging a competent civilian lawyer through the resources and help of his relatives had infringed his fundamental right under Article 22 of the Constitution. If the petitioner had made any express request for being defended by a counsel of his choice, he should have stated so straightforwardly in paragraph 9 of his petition. His involved language could only mean that he could not contact his relations for their arranging a civilian lawyer for his defence. This negatives any suggestion of a request to the Military Authorities for permission to allow him representation by a practising lawyer and its refusal.

We therefore hold that there has been no violation of the fundamental right of the petitioner to be defended by a counsel of his choice conferred under Article 22 (1) of the Constitution.

Further, we do not consider it necessary to deal with the questions, raised at the hearing, about the validity of rule 96 of the Army Rules, 1954, hereinafter called the Rules, and about the power of Parliament to delegate its powers under Article 33 of the Constitution to any other authority.

The next point urged for the petitioner is that the sentence of death passed by the Court-Martial was against the provisions of section 132 (2) of the Act inasmuch as the death sentence was voted by an inadequate majority. The certificate, signed by the presiding officer of the Court-Martial and by the Judge-Advocate, and produced as Annexure 'A' to the respondent's counter to the petition, reads:

"Certified that the sentence of death is passed with the concurrence of at least Two-Third of the members of the Court as provided by AA section 132 (2)."

It is alleged by the petitioner that this certificate is not genuine but was prepared after his filing the Writ Petition. We see no reason to accept the petitioner's allegations. He could not have known about the voting of the members of the General Court-Martial. Rule 45 gives the Form of Oath or of Affirmation which is administered to every member of a Court-Martial. It enjoins upon him that he will not on any account at any time whatsoever disclose or discover the vote or opinion of any particular member of the Court-Martial unless required to give evidence thereof by a Court of Justice or Court-Martial in due course of law. Similar is the provision in the Form of Oath or of Affirmation which is administered to the Judge-Advocate, in pursuance of rule 46. Rule 61 provides that the Court shall deliberate on its finding in closed Court in the presence of the Judge-Advocate. It is therefore, clear that only the members of the Court and the Judge-Advocate can know how the members of the Court-Martial gave their votes. The votes are not tendered in writing. No record is made of them. Sub-rule (2) of rule 61 provides that the opinion of each member of the Court as to the finding shall be given by word of mouth on each charge separately. Rule 62 provides that the finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in the Rules, shall be recorded simply as a finding of 'guilty' or of 'not guilty'. In view of these provisions, the petitioner's statement, which can be considered to be a mere allegation, cannot be based on any definite knowledge as to how the voting went at the consideration of the finding in pursuance of rule 61.

Further, there is no reason to doubt what is stated in the certificate which, according to the counter-affidavit, is not recorded in pursuance of any provision governing the proceedings of the Court-Martial, and does not form part of any

such proceedings. It is recorded for the satisfaction of the confirming authority. The certificate is dated 12th January, 1963, the date on which the petitioner was convicted. The affidavit filed by Col N S Bains, Deputy Judge Advocate-General Army Headquarters, New Delhi, contains a denial of the petitioner's allegation that the certificate is a false and concocted document and has been made by the authorities after the filing of the Writ Petition. We see no reason to give preference to the allegations of the petitioner over the statement made by Col^e Bains in his affidavit, which finds support from the contents of Exhibit A signed by the Presiding Officer of the Court Martial and the Judge Advocate who could possibly have no reason for issuing a false certificate. We therefore hold that there had been no non-compliance of the provisions of section 132 (2) of the Act.

Next we come to the fifth point. It is true that section 164 of the Act gives two remedies to the person aggrieved by an order, finding or sentence of a Court-Martial: they being a petition to the authority which is empowered to confirm such order, finding or sentence and the petition to the Central Government or some other officer mentioned in sub-section (2), after the order or sentence is confirmed by the former authority. The final authority to which the person aggrieved by the order of the Court Martial can go is the authority mentioned in sub-section (2) of section 164 and if this authority happens to be the confirming authority, it is obvious that there could not be any further petition from the aggrieved party to any other higher authority against the order of confirmation. The further petition can only be to the authority superior to the authority which confirms the order of the Court Martial and if there be no authority superior to the confirming authority, the question of a remedy against its order does not arise. Section 164 does not lay down that the correctness of the order of sentence of the Court-Martial is always to be decided by two higher authorities. It only provides for two remedies.

Section 153 of the Act provides *inter alia* that no finding or sentence of a General Court Martial shall be valid except so far as it may be confirmed as provided by the Act and section 154 provides that the findings and sentence of a General Court-Martial may be confirmed by the Central Government or by any officer empowered in that behalf by warrant of the Central Government. It appears that the Central Government itself exercised the power of confirmation of the sentence awarded to the petitioner in the instant case by the General Court-Martial. The Central Government is the highest authority mentioned in sub-section (2) of section 164. There could therefore be no occasion for a further appeal to any other body and therefore no justifiable grievance can be made of the fact that the petitioner had no occasion to go to any other authority with a second petition as he could possibly have done in case the order of confirmation was by any authority subordinate to the Central Government. The Act itself provides that the Central Government is to confirm the findings and sentences of General Court Martial and therefore could not have contemplated, by the provisions of section 164, that the Central Government could not exercise this power but should always have this power exercised by any other officer which it may empower in that behalf by warrant.

We therefore do not consider this contention to have any force.

Lastly, Mr Rana, learned Counsel for the petitioner, urged in support of the first point that in the exercise of the power conferred on Parliament under Article 33 of the Constitution to modify the fundamental rights guaranteed by Part III, in their application to the armed forces, it enacted section 21 of the Act which empowers the Central Government, by notification, to make Rules restricting to such extent and in such manner as may be necessary, the right of any person with respect to certain matters that these matters do not cover the fundamental rights under Articles 14, 20 and 22 of the Constitution, and that this indicated the intention of Parliament not to modify any other fundamental right. The learned Attorney-General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent with the provisions of any of the Articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency

Parliament had modified the fundamental rights under those Articles in their application to the person subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Article 33 of the Constitution, made the requisite modification to affect the respective fundamental right. We are however of opinion that the provisions of section 125 of the Act are not discriminatory and do not infringe the provisions of Article 14 of the Constitution. It is not disputed that the persons to whom the provisions of section 125 apply do form a distinct class. They apply to all those persons who are subject to the Act and such persons are specified in section 2 of the Act. The contention for the petitioner is that such persons are subject to be tried for civil offences, *i.e.*, offences which are triable by a criminal Court [section 3 (ii) of the Act] both by the Court-Martial and the ordinary Criminal Courts, that section 125 of the Act gives a discretion to certain officers specified in the section to decide whether any particular accused be tried by a Court-Martial or by a Criminal Court, that there is nothing in the Act to guide such officers in the exercise of their discretion and that therefore discrimination between different persons guilty of the same offence is likely to take place inasmuch as a particular officer may decide to have one accused tried by a Court-Martial and another person, accused of the same offence, tried by a Criminal Court, the procedures in such trials being different.

We have been taken through the various provisions of the Act and the Rules with respect to the trial of offences by a Court-Martial. The procedure to be followed by a Court-Martial is quite elaborate and generally follows the pattern of the procedure under the Code of Criminal Procedure. There are however, material differences too. All the members of the Court-Martial are Military Officers who are not expected to be trained Judges, as the presiding officers of Criminal Courts are. No Judgment is recorded. No appeal is provided against the order of the Court-Martial. The authorities to whom the convicted person can represent against his conviction by a Court-Martial are also non-judicial authorities. In the circumstances, a trial by an ordinary Criminal Court would be more beneficial to the accused than one by a Court-Martial. The question then is whether the discretion of the officers concerned in deciding as to which Court should try a particular accused can be said to be an unguided discretion, as contended for the appellant. Section 125 itself does not contain anything which can be said to be a guide for the exercise of the discretion, but there is sufficient material in the Act which indicate the policy which is to be a guide for exercising the discretion and it is expected that the discretion is exercised in accordance with it. Magistrates can question it and the Government, in case of difference of opinion between the views of the Magistrate and the Army Authorities, decide the matter finally.

Section 69 provides for the punishment which can be imposed on a person tried for committing any civil offence at any place in or beyond India, if charged under section 69 and convicted by a Court-Martial. Section 70 provides for certain persons who cannot be tried by Court-Martial, except in certain circumstances. Such persons are those who commit an offence of murder, culpable homicide not amounting to murder or of rape, against a person not subject to Military, Naval or Air-Force law. They can be tried by Court-Martial of any of those three offences if the offence is committed while on active service or at any place outside India or at a frontier post specified by the Central Government by notification in that behalf. This much therefore is clear that persons committing other offences over which both the Court-Martial and ordinary Criminal Courts have jurisdiction can and must be tried by Courts-Martial if the offences are committed while the accused be on active service or at any place outside India or at a frontier post. This indication of the circumstances in which it would be better exercise of discretion to have a trial by Court-Martial, is an index as to what considerations should guide the decision of the officer concerned about the trial being by a Court-

Martial or by an ordinary Court. Such considerations can be based on grounds of maintenance of discipline in the army, the persons against whom the offences are committed and the nature of the offences. It may be considered better for the purpose of discipline that offences which are not of a serious type be ordinarily tried by a Court Martial which is empowered under section 69 to award a punishment provided by the ordinary law and also such less punishment as may be mentioned in the Act. Chapter VII mentions the various punishments which can be awarded by Court Martial and section 72 provides that subject to the provisions of the Act a Court-Martial may, on convicting a person of any of the offences specified in sections 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable or in lieu thereof any one of the punishments lower in the scale set out in section 71, regard being had to the nature and degree of the offence.

The exigencies of service can also be a factor. Offences may be committed when the accused be in camp or his unit be on the march. It would lead to great inconvenience if the accused and witnesses of the incident, if all or some of them happen to belong to the army, should be left behind for the purpose of trial by the ordinary Criminal Court.

The trials in an ordinary Court are bound to take longer, on account of the procedure for trials and consequent appeals and revision, than trials by Court-Martial. The necessities of the service in the army require speedier trial. Sections 102 and 103 of the Act point to the desirability of the trial by Court Martial to be conducted with as much speed as possible. Section 120 provides that subject to the provisions of sub-section (2), a summary Court Martial may try any of the offences punishable under the Act and sub-section (2) states that an officer holding a summary Court Martial shall not try certain offences without a reference to the officer empowered to convene a District Court Martial or on active service a summary General Court Martial for the trial of the alleged offender when there is no grave reason for immediate action and such a reference can be made without detriment to discipline. This further indicates that reasons for immediate action and detriment to discipline are factors in deciding the type of trial.

Such considerations, as mentioned above, appear to have led to the provisions of section 124 which are that any person subject to the Act, who commits any offence against it, may be tried and punished for such offence in any place whatever. It is not necessary that he be tried at a place which be within the jurisdiction of a Criminal Court having jurisdiction over the place where the offence be committed.

In short it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court Martial or by an ordinary Criminal Court, and therefore it becomes inevitable that the discretion to make the choice as to what Court should try the accused be left to responsible Military Officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.

Lastly, it may be mentioned that the decision of the relevant Military Officer does not decide the matter finally. Section 126 empowers a criminal Court having jurisdiction to try an offender to require the relevant Military Officer to deliver the offender to the Magistrate to be proceeded against according to law or to postpone proceedings pending reference to the Central Government, if that Criminal Court be of opinion that proceedings be instituted before itself in respect of that offence. When such a request is made the Military Officer has either to comply with it or to make a reference to the Central Government whose order would be final with respect to the venue of the trial. The discretion exercised by the Military Officer is therefore subject to the control of the Central Government.

Reference may also be made to section 549 of the Code of Criminal Procedure which empowers the Central Government to make Rules consistent with the Code and other Acts, including the Army Act, as to the cases in which persons subject to military, naval or air-force law be tried by a Court to which the Code applies or by Court-Martial. It also provides that when a person accused of such an offence which can be tried by an ordinary Criminal Court or by a Court-Martial is brought before a Magistrate, he shall have regard to such Rules, and shall, in proper cases, deliver him, together with a statement of the offence of which he is accused, to the Commanding Officer of the regiment, corps, ship or detachment to which he belongs, or to the Commanding Officer of the nearest military, naval or air-force station, as the case may be, for the purpose of being tried by Court-Martial. This gives a discretion to the Magistrate, having regard to the Rules framed, to deliver the accused to the Military Authorities for trial by Court-Martial.

The Central Government framed Rules by S.R.O. No. 709 dated 17th April, 1952 called the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, under section 549, Criminal Procedure Code. It is not necessary to quote the Rules in full. Suffice it to say that when a person charged is brought before a Magistrate on an accusation of offences which are liable to be tried by Court-Martial, the Magistrate is not to proceed with the case unless he is moved to do so by the relevant Military Authority. He can, however, proceed with the case when he be of opinion, for reasons to be recorded, that he should so proceed without being moved in that behalf by competent authority. Even in such a case he has to give notice of his opinion to the Commanding Officer of the accused and is not to pass any order of conviction or acquittal under sections 243, 245, 247 or 248 of the Code of Criminal Procedure, or hear him in defence under section 244 of the said Code; is not to frame any charge against the accused under section 254 and is not to make an order of committal to the Court of Session or the High Court under section 213 of the Code, till a period of 7 days expires from the service of notice on the Military Authorities. If the Military Authorities intimate to the Magistrate before his taking any of the aforesaid steps that in its opinion the accused be tried by Court-Martial, the Magistrate is to stay proceedings and deliver the accused to the relevant authority with the relevant statement as prescribed in section 549 of the Code. He is to do so also when he proceeds with the case on being moved by the Military Authority and subsequently it changes its mind and intimates him that in its view the accused should be tried by Court-Martial. The Magistrate, however, has still a sort of control over what the Military Authorities do with the accused. If no effectual proceedings are taken against the accused by the Military Authorities within a reasonable time, the Magistrate can report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law. All this is contained in rules 3 to 7. Rule 8 practically corresponds to section 126 of the Act and rule 9 provides for the Military Authorities to deliver the accused to the ordinary Courts when in its opinion or under the orders of the Government, the proceedings against the accused are to be before a Magistrate.

According to section 549 of the Code and the Rules framed thereunder, the final choice about the forum of the trial of a person accused of a civil offence rests with the Central Government, whenever there be difference of opinion between a Criminal Court and the Military Authorities about the forum where an accused be tried for the particular offence committed by him. His position under sections 125 and 126 of the Act is also the same.

It is clear therefore that the discretion to be exercised by the Military Officer specified in section 125 of the Act as to the trial of accused by Court-Martial or by an ordinary Court, cannot be said to be unguided by any policy laid down by the Act or uncontrolled by any other authority. Section 125 of the Act therefore cannot, even on merits, be said to infringe the provisions of Article 14 of the Constitution.

The Writ Petition therefore fails and is dismissed.

V.S.

Petition dismissed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K SUBBA RAO, RAGHUBAR DAYAL AND J R MUDHOLKAR, JJ.
 Bai Achhuba Amarsingh Appellant*

Kalidas Harnath Ojha and others Respondents

Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), sections 63, 64 and 84—Scope—Sale deed in contravention of sections 63 and 64—Proceeding before Collector under section 84 for eviction of person in possession under the deed—Landlord and any person interested can apply—Declaration of invalidity of sale can be made by Collector—Section 84 A as enacted by Act (XIII of 1956)—Section only prospective—Declaration of invalidity made already—Not affected

The appellant and the villagers sought redress from the Collector under section 84 of Bombay Tenancy and Agricultural Lands Act for the eviction of the respondent from the survey field upon the ground that the sale deed on which the respondent based his claim to possession of the field was in contravention of sections 63 and 64 of the Act.

Held by majority —It is no doubt true that sections 63 and 64 render certain transactions invalid. But where advantage is sought to be taken of the invalidity of a transaction on the ground that it contravenes sections 63 and 64 and relief such as that available under section 84 of the Act is sought it becomes necessary for the Collector to adjudicate upon the dispute and decide whether the transaction is or is not rendered invalid by either of these provisions. It is because of this that the Collector proceeded to adjudicate upon the validity of the transaction.

Under section 84 a landlord or any person interested can resort to the remedy provided therein.

When the Legislature provided in section 84-A that a transfer is in contravention of either of the two sections what it meant was merely that that transfer shall not be treated to be invalid even when it is found to be in contravention of sections 63 and 64 of the Act.

The provisions of section 84-A are prospective in their application. The section does not affect any adjudication in which a transfer had already been held to be invalid.

(*Per Raghubar Dayal J*) —There is nothing in any provision of the Act which empowers the Collector to make a declaration about the sale deed to be invalid or void for contravening the provisions of sections 63 and 64 of the Act. In proceedings under section 84 of the Act the Collector would have no such power.

Appeal by Special Leave from the Judgment and Order dated 1st July, 1959* of the Bombay High Court (now Gujarat High Court) in Special Civil Application No. 302 of 1959.

M V Goswami, Advocate, for Appellant

G B Pat, Advocate and *O C Mathur*, Advocate of *M/s J.B. Dadachani & Co.*, for Respondent No. 1

K L. Hathi, Advocate for *R H Dhebar*, Advocate, for Respondent No. 2

The Court delivered the following Judgments —

Mudholkar, J (for *Subba Rao, J* and himself) —This is an appeal by Special Leave from the judgment of the High Court of Bombay allowing a Writ Application preferred before it by the first respondent and setting aside the order of the Bombay Revenue Tribunal which had upheld the order of the Prant Officer in a matter arising under the Bombay Tenancy and Agricultural Lands Act, 1948 (Bom LXVII of 1948) hereafter referred to as the Act.

The appellant was admittedly the owner of Survey Nos. 231 and 260 of the Village Duchakwada Taluka Deodar, District Banaskantha in the State of Gujarat. Survey No. 231 was leased out to a tenant, Virva Pana, while Survey No. 260 had been reserved by her in the year 1950 for grazing cattle. Possibly other cattle in the village were also allowed to graze there because of paucity of grazing facilities therein.

The appellant is a jagirdar and evidently possesses considerable property. The respondent No. 1 was for some time her *karbhari* (manager of her estate). While he was occupying that position he obtained from her a sale deed on 31st October, 1950, in respect of both these fields. According to the appellant she received no consideration for the transaction. However, that is not material. Shortly thereafter, the appellant made an application to the Mamlatdar, Deodar, for a declaration that the sale deed was invalid as being in contravention of sections 63 and 64 of the Act. It would appear that at about the same time certain villagers of Duchakwada made an application before the Collector, Banaskantha under section 84 of the Act for the summary eviction of the respondent No. 1 on the ground that the transaction was rendered void by virtue of the provisions of sections 63 and 64 of the Act and also seeking the reservation of Survey No. 260 for grazing purposes. It seems that the appellant's application also went before the Collector, inasmuch as the order he made dealt with the appellant's contention also. It ran thus :

"Taking into consideration all the circumstances it is hereby ordered that the sale made by Shrimati Achhuba in respect of two fields Vidvalu and Vaghdelavalu should be treated as void under section 64 (3) of the Bombay Tenancy and Agricultural Lands Act and the village records corrected accordingly. Shrimati Achhuba should be persuaded to set apart these two fields as grazing area for the grazing of village cattle of Duchakwada in order to maintain the standard as fixed by the Government. If she agrees, the persons in the present occupation of the land should be evicted and the fields kept open for free grazing of village cattle."

An application for revision preferred by the respondent No. 1 before the Bombay Revenue Tribunal was dismissed by it. Thereupon he preferred a Writ Petition before the High Court. The High Court, while it affirmed the order of the Revenue Tribunal, in so far as Survey No. 231 was concerned, remanded the matter to the Collector for deciding two points, one being whether the respondent No. 1 was an agriculturist and the other whether there was a tenant on the land and if it found that there was no tenant whether the Collector was justified in declaring the sale void under section 63 (1). When the matter went back to the Revenue Tribunal after remand it was contended on behalf of the respondent No. 1 that the Collector had no jurisdiction to declare the sale to be void without passing a consequential order under section 84. The Tribunal held that since this point had not been raised at the earlier stages of the proceedings nor even before the High Court the point should not be allowed to be raised. The Tribunal further held that respondent No. 1 was not an agriculturist. It also held that the Collector was justified in declaring the sale even of Survey No. 260 void. A second Writ Petition was preferred by the respondent No. 1 against this order ; but it was dismissed by the High Court.

It will thus be seen that it had finally been held in the proceedings to which the respondent No. 1 was a party that the entire transaction in his favour was void and that he was in unauthorised occupation not only of Survey No. 231 but also of Survey No. 260.

In the year 1956 the Act was extensively amended. The amendment came into force in August, 1956. One of the new provisions in the Act is section 84-A. This provision reads thus :

"Section 84-A (1) : A transfer of any land in contravention of section 63 or 64 as it stood before the commencement of the Amending Act, 1955 made after the 28th day of December, 1948 (when the Bombay Tenancy and Agricultural Lands Act, 1948 came into force) and before the 15th day of June, 1955 shall not be declared to be invalid merely on the ground that such transfer was made in contravention of the said sections if the transferee pays to the State Government a penalty equal to one per cent of the consideration or Rs. 100, whichever is less :

Provided that, if such transfer is made by the landlord, in favour of the tenant in actual possession, the penalty leviable in respect thereof shall be one rupee :

Provided further that if any such transfer is made by the landlord in favour of any person other than the tenant in actual possession; and such transfer was made either after the unlawful eviction of such tenant, or results in the eviction of the tenant in actual possession, then such transfer shall not be deemed to be validated unless such tenant has failed to apply for the possession of the land under sub-section (1) of section 29 within two years from the date of his eviction from the land.

(2) On payment of such penalty the Mamlatdar shall issue a certificate to the transferee that such transfer is not invalid.

(3) Where the transferee fails to pay the penalty referred to in sub-section (1) within such period as may be prescribed, the transfer shall be declared by the Mamlatdar to be invalid and thereupon the provisions of sub-sections (3) to (5) of section 84-C shall apply.

Seeking to avail himself of this provision the respondent No. 1 made an application before the Mamlatdar, Deodar for validation of the transfer in his favour. This application was granted by the Mamlatdar. Shortly after this happened the Collector of Banaskantha took up the matter *suo motu* in revision and set aside the order of the Mamlatdar. A revision application preferred against the order of the Collector was dismissed by the Revenue Tribunal. Thereafter the respondent No. 1 preferred a Writ Petition before the High Court which was thus his third Writ Petition. That petition having been allowed, the appellant has come up before this Court, as already stated, by Special Leave.

The High Court, in allowing the application, came to the conclusion that the previous adjudication to the effect that the transaction upon which the respondent No. 1 relies is invalid, does not, in so far as Survey No. 260 is concerned, come in the way of applying the provisions of sub-section (1) of section 84 A. The High Court observed that a transfer in contravention of sections 63 and 64 becomes invalid by operation of law and has not to be declared to be such and, therefore, the mere fact that the Collector has declared a transfer to be invalid because it contravenes either of these sections would not render the new provisions inapplicable.

In coming to this conclusion the High Court has apparently overlooked the provisions of section 84 and also the fact that it was under this provision that the appellant as well as the villagers had sought redress from the Collector, upon the ground that the sale deed on which the respondent based his claim to possession of the fields was in contravention of the provisions of sections 63 and 64. We are no longer concerned with Survey No. 231 but are concerned only with Survey No. 260.

It is no doubt true that sections 63 and 64 render certain transactions invalid. But where advantage is sought to be taken of the invalidity of a transaction on the ground that it contravenes sections 63 and 64 and relief such as that awardable under section 84 of the Act is sought, it becomes necessary for the Collector to adjudicate upon the dispute and decide whether the transaction is or is not rendered invalid by either of these provisions. It is because of this that the Collector did proceed to adjudicate upon the validity of the transaction.

It was contended before us that all that was before the Collector was an application made by certain residents of Duchakwada who had been deprived of their grazing right over Survey No. 260. That is not correct because there is the admission of the respondent No. 1 himself in his Writ Petition before the High Court, dated 17th February, 1959, that the villagers had sought the cancellation of the sale deed which comprised of the fields and that the appellant also had made an application for cancellation of the sale deed in his favour. Even assuming that the appellant had not moved the Collector under section 84 or that her application was not properly before the Collector, we may point out that for invoking the provisions of section 84 of the Act it is not of the essence that an application must be made by the landlord alone. Upon the language of that provision any person interested can resort to the remedy provided therein and when its provisions are resorted to it becomes the bounden duty of the Collector to decide under clause (a) thereof as to whether the person sought to be evicted is or is not in possession in pursuance of an invalid transfer.

It was next contended on the respondent's behalf that so far as Survey No. 260 is concerned the Collector had refused to pass an order of eviction and, therefore, the declaration as to invalidity of the sale of Survey No. 260 made by the Collector would be no bar to the applicability of section 84 A. This contention is also without any force. We have already quoted the portion of the order of the Collector in

so far as it related to the prayer of the appellant for evicting the respondent No. 1 from Survey No. 260. It will be clear from it that the Collector did grant a conditional relief with respect to this field. For granting such a relief it was thus necessary for the Collector to adjudicate upon the validity or otherwise of the transfer. The Collector's order was affirmed by the Revenue Tribunal and the Writ Petition in which the respondent challenged it before the High Court was dismissed. The whole question, including the validity of the Collector's order must, therefore, be regarded as having become final and conclusive between the parties. Even assuming that despite all that has happened, it is open to us to consider whether the order of the Collector declaring the sale transaction to be void was within his jurisdiction or not, we have little doubt that it was within his jurisdiction. No doubt, neither section 63 or section 64 nor even section 84 speaks of making a formal declaration by the Collector that a transaction is void because it is in contravention either of section 63 or section 64 cannot be just ignored by the transferor. Some authority must determine whether in fact the transfer is in contravention of either of these provisions. The question of obtaining such a determination will arise where the transferor has lost possession. For obtaining possession of which the transferor was deprived in consequence of an invalid transfer the Act enables him to resort to the provisions of section 84. Under that provision the Collector has to ascertain as already stated, whether the transfer is in fact in contravention of section 63 or section 64. His finding in that regard is tantamount to a declaration that the transfer is invalid. We may point out that there is no provision in the Act which expressly provides for the making of a formal declaration by any Revenue Authority to the effect that a transfer in contravention of section 63 or section 64 is invalid. When the Legislature provided in section 84-A that a transfer in contravention of either of the two sections what it meant was merely this that transfer shall not be treated to be invalid even when it is found to be in contravention of section 63 or section 64 of the Act. This is precisely what the Collector did in this case. Unless we give this meaning to the words they will be meaningless.

We are further of the view that the provisions of section 84-A are prospective in their application. A bare perusal of the provisions of section 84-A would show that what that section does is to impose an embargo upon the making of a declaration that a transfer is invalid on the ground that it was made in contravention of the provisions of sections 63 and 64. Its operation is thus prospective in the sense that it bars making of any declaration or a finding that a transfer is invalid after it came into force. It does not affect any adjudication in which a transfer had already been held to be invalid. Thus it can possibly have no application to a case like the present wherein a declaration or a finding as to invalidity had already been made by the Collector and was followed by an order of eviction, *albeit conditional*. The Mamlatdar, therefore, had no jurisdiction to issue the certificate in question to the respondent. That being the position we must hold that the High Court was in error in setting aside the order of the Revenue Tribunal upholding that of the Collector. We, therefore, set aside the order of the High Court and restore that of the Revenue Tribunal. Costs throughout will be borne by the respondent No. 1.

Raghubar Dayal, J.—I am of opinion that the appeal be dismissed.

The appellant, Jagirdar of village Duchakwada, sold two fields bearing Survey numbers 231 and 260, to respondent No. 1, Kalidas Harnath Ojha, hereinafter called the respondent on 28th October, 1950. On 24th November, 1952 the Collector, District Banaskantha, passed an order, after an enquiry on applications, by certain persons of that village to the Government, to him and to the Deputy Collector, Tharad, that the sale deed of the two plots was invalid in view of the provisions of sections 63 and 64 of the Bombay Tenancy and Agricultural Lands Act, 1948 (LXVII of 1948), hereinafter called the Act. He ordered the eviction of the appellant from plot No. 231 as he found that one Harijan Vira Pana, one of the applicants, was the tenant of that plot. We are not now concerned with this order with respect to plot No. 231.

With regard to plot No 260, the Collector ordered in view of the shortage of grazing land for cattle in the village

Shrimati Achhuba should be persuaded to set apart these two fields as grazing area for the grazing of village cattle of Duchakwada in order to maintain the standard as fixed by the Government. If she agrees the persons in the present occupation of the land should be evicted and the fields kept open for free grazing of village cattle.

The Collector was wrong in mentioning the two fields in the above quoted order as one of the fields in dispute before him was field No 231 and about which he had earlier, in his order, directed the Prant Officer to restore that field to Harijan Vira Pana immediately.

The respondent's appeal against this order was dismissed by the Bombay Revenue Tribunal on 27th October, 1955. The Revenue Tribunal treated the Collector's order to be an order under section 84 of the Act. The respondent then approached the High Court of Bombay with Special Civil Application No 2817 of 1955. The High Court allowed the application on 2nd July, 1956 with respect to plot No 260, set aside the order of the Revenue Tribunal and remanded the dispute about that plot to be decided by the Tribunal afresh, according to law. On remand, the Tribunal again dismissed the respondent's appeal on 3rd June, 1957. The respondent again went to the High Court by Special Civil Application No 2220 of 1957. The High Court dismissed the petition on 18th December, 1957.

In the meantime, on 1st August, 1956 the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 (XIII of 1956) came into force. By this Act, section 84 A was added in the Parent Act. This section reads

(1) A transfer of any land in contravention of section 63 or 64 as it stood before the commencement of the Amending Act, 1955 made after the 28th day of December 1948 (when the Bombay Tenancy and Agricultural Lands Act 1948 came into force) and before the 15th day of June, 1956 shall not be declared to be invalid merely on the ground that such transfer was made in contravention of the said sections if the transferee pays to the State Government a penalty equal to one per cent of consideration or Rs 100, whichever is less.

Provided that if such transfer is made by the landlord, in favour of the tenant in actual possession, the penalty leviable in respect thereof shall be one rupee.

Provided further that if any such transfer is made by the landlord in favour of any person other than the tenant in actual possession, and such transfer is made either after the unlawful eviction of such tenant or results in the eviction of the tenant in actual possession, then such transfer shall not be deemed to be valid unless such tenant has failed to apply for the possession of the land under sub-section (1) of section 29 within two years from the date of his eviction from the land.

(2) On payment of such penalty the Mamlatdar shall issue a certificate to the transferee that such transfer is not invalid.

(3) Where the transferee fails to pay the penalty referred to in sub-section (1) within such period as may be prescribed, the transfer shall be declared by the Mamlatdar to be invalid and there upon the provisions of sub-sections (3) to (5) of section 84-C shall apply.

The respondent took advantage of the provisions of this section, deposited Rs 35 as fine on 9th December, 1957 and the same day got the order of the Mamlatdar Tenancy Aval Karkun, recognizing the sale to him of plot No 260 under the sale deed of 1950.

The Deputy Collector set aside the order of the Mamlatdar holding that section 84 A did not apply to the sale of plot No 260 as that sale had been declared to be invalid by the Collector prior to the coming into force of section 84 A. The respondent then went in revision against this order to the Bombay Revenue Tribunal and was unsuccessful. He then filed Special Civil Application No 302 and prayed for the quashing and the setting aside of the Tribunal's Order. The High Court set aside the order of the Tribunal holding that section 84 A applied to the sale of plot No 260 to the appellant, that the sale was invalid by operation of law and required no declaration to that effect from the Collector and that there was nothing in section 84 A which would justify excluding from the operation of that section transfers which had been declared invalid prior to the coming into force of that provision of law. The High Court restored the order of the Mamlatdar dated 19th December, 1957 by which he had issued a certificate to the respondent that

the transfer of plot No. 260 was not invalid. It is against this order that Bai Achhuba has preferred this appeal after obtaining Special Leave from this Court.

The appellant was a party to all the proceedings subsequent to the order of the Collector dated 24th November, 1952. She did appear before the Collector during his enquiry. It was stated at the hearing of the appeal that she had also applied to the Collector. This was disputed by the respondent. The matter was considered to be of some importance in view of the respondent's contention that the previous orders on the application of the villagers operated as *res judicata*, and this Court ordered the appellant, in March, 1963 to file certified copies of the various documents mentioned in that order. Those documents included the alleged application made to the Collector and an affidavit by the appellant showing that she was a party to the proceedings before the Collector. The appellant filed copies of certain orders of the various Courts and a copy of the Special Civil Application No. 2220 of 1957. She did not file a certified copy of the application said to have been presented by her to the Collector simultaneously with the other villagers. Nagarlal Dalpatram Vyas, describing himself as a *Karbhari* of the appellant, states in his affidavit :

"I personally went to the Mamlatdar of Deodar Prant Officer of Radhanpur, the Collector of Banaskantha, the Bombay Revenue Tribunal and the High Court of Gujarat, to obtain a certified copy of the application made by the applicant herein to the Collector of Banaskantha, which resulted into his said order of 24th November, 1952, but I have been told that the record is not there with any of those Courts or Authorities. I was told by the Collector of Banaskantha the record of the case had gone to the Bombay High Court. On inquiry it is found that the Gujarat High Court does not have it though in ordinary course it ought to have received it from Bombay High Court."

The respondent has filed a counter-affidavit stating that the appellant had not filed any petition or application before the Collector under section 84 of the Act seeking his eviction. On this material, I am not satisfied that the appellant had applied to the Government or the Collector simultaneously with the other villagers on whose applications the Collector made an enquiry and passed the order of 24th November, 1952. The Collector's order makes no mention of any application by the appellant and states that certain persons of village Duchakwada, among whom were agriculturists and tenants of Duchakwada Jagir, had made applications praying that the sale deed be declared void and the village records corrected accordingly. None of the other orders of the Courts makes any reference to the application by Bai Achhuba to the Collector, even though some of them definitely state about her application to the Mamlatdar. The order of the Revenue Tribunal dated 3rd June, 1957 states :

"The original proceeding started on an application made to the Collector of Banaskantha by some villagers of Duchakwada."

The High Court, in its order on Special Civil Application No. 2220 of 1957 referred to the application of Bai Achhuba to the Mamlatdar and then said :

"It would appear that shortly before this application, an application had been made by certain villagers of the place and by the application the villagers claimed that the sale deed should be declared void and the village records should be corrected accordingly."

To my mind the following questions arise in this case : (i) Whether any proceedings started on the application of the villagers for setting aside the sale deed and the correction of the record, can be said to be proceedings under section 84 of the Act. (ii) Whether the Collector, in such proceedings, can make a declaration, distinct from deciding or making a decision, about the invalidity of the sale deed or whether he can merely decide about the invalidity of the sale deed in order to form an opinion whether the person proceeded against was in possession of the land unauthorisedly or wrongfully and therefore should be evicted or not. (iii) Whether the order of the Collector, be it of declaration or of mere decision about the invalidity of the sale deed with respect to sale of plot No. 260, had become final before the coming into force of the provisions of section 84-A of the Act on 1st August, 1956. (iv) If such order had become final, whether that affects the operation of section 84-A in this case.

On the first point it may be assumed that the proceedings before the Collector in 1952 were proceedings under section 84 of the Act as had been treated by the Revenue Tribunal and the High Court in the various proceedings before them.

On the second point, I am of opinion that there is nothing in any provision of the Act which empowers the Collector to make a declaration about the sale deed to be invalid or void for contravening the provisions of sections 63 and 64 of the Act. The High Court, in its order dated 2nd July, 1956 in Special Civil Application No. 2817 of 1955 said, in dealing with the matter about plot No. 231

"Again, in our view, an order passed by a Collector ordering summary eviction of a person who in his view, is unauthorisedly occupying or is in wrongful occupation of the land does not decide finally any question of title and we agree with the view of the Tribunal that it is open to the petitioner Kalidas Oza to file a civil suit to establish his title in the civil Court."

Again, in its order dated 18th December, 1957 in Special Civil Application No. 2520 of 1957, the High Court said.

"Mr. Barot argues that a Tenancy Court cannot give a declaration that a sale in contravention of either section 63 or section 64 is invalid. Mr. Barot would seem to be right. A Tenancy Court is not competent to give a declaration. The power is the power of a civil Court to give such declaration in conformity with the provisions of section 42 of the Specific Relief Act. But I do not agree with the contention of Mr. Barot that a Tenancy Court cannot decide the question as to whether section 63 or a breach of section 64 of the Act and it is precisely this question which the Collector as well as the Bombay Revenue Tribunal have decided."

It is clear therefore that though the Collector has necessarily, in certain proceedings under section 84 of the Act, to record a finding that certain sale deed is invalid and consequently the person in possession on its basis, is an unauthorised possession, he has no power to formally declare the sale deed to be invalid. Ordinarily it is for the civil Court to make a formal declaration about the validity of a deed. It is only when any other Act specifically empowers a certain officer or Court to declare a certain deed invalid that that Court or officer would have the power to make such a declaration. It follows that the Collector could not, in proceedings under section 84 of the Act, make a declaration about a sale deed to be invalid. All what he decided by his order dated 18th November, 1952 was that in view of the provisions of law the sale deed in favour of respondent No. 1 was invalid. The appellant must have realised that the decision of the Collector could not amount to the setting aside of the sale deed declaring it to be invalid and so she instituted a Civil Suit in 1953 for a declaration that the sale deed was null and void and for the recovery of possession over the properties included in the sale deed. The suit was dismissed under order 9, rule 8 read with order 17, rule 2 of the Code of Civil Procedure.

The order of the Collector deciding that the sale deed was invalid had not even become final by the time section 84-A was introduced in the Act on 1st August, 1956. On 2nd July, 1956 the High Court remanded the matter to the Revenue Tribunal for decision according to law. The Tribunal passed its order on 3rd June, 1957.

It follows therefore that apart from the consideration already mentioned that the Collector had no power to declare a sale deed invalid while dealing with a matter under section 84 of the Act, that order had not become final by 1st August, 1956 and that therefore the respondent could take advantage of the provisions of section 84-A. He could have his sale deed which was executed between 28th December, 1948 and 15th June, 1955 validated on payment of the requisite penalty under sub-section (1) of section 84-A. This section empowers the Mamlatdar to issue the certificate of validity and by sub-section (3) provides that the Mamlatdar would declare the transfer to be invalid in case the transferee failed to pay the penalty. The provisions of section 84-A brought the matter of validity or invalidity of a transfer deed within the jurisdiction of the Mamlatdar. It was in the exercise of this jurisdiction that the Mamlatdar issued a notice on 7th October, 1957 to the respondent for paying the penalty of Rs. 100 calculated at the rate of 5 per cent. on the consideration of the sale deed. On 9th December, 1957 the Mamlatdar

issued the necessary certificate validating the sale deed on the respondent's paying Rs. 35. I consider the certificate to be good in law.

It is not necessary to express an opinion in this case whether the Mamlatdar could certify a transfer to be valid in case it had been legally declared invalid by a competent Court previously.

I am therefore of opinion that the order of the High Court under appeal is correct and that this appeal be dismissed.

ORDER OF THE COURT.—In view of the judgment of the majority, the Order of the High Court is set aside and that of the Revenue Tribunal restored. The costs throughout will be borne by respondent No. 1.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P.B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K.C. DAS GUPTA, J.C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Jagdev Singh Sidhanti

*Appellant**

v.

Pratap Singh Daulta and others

Respondents.

Representation of the People Act (XLIII of 1951), section 123 (1)—“Om” flag—If a religious symbol—Use in election campaign—If corrupt practice—Burden of proof as to corrupt practice—Espousing cause of a particular language—If corrupt practice.

To “Om” high spiritual or mystical efficacy is undoubtedly ascribed; but its use on a flag does not symbolise religion or anything religious. But assuming that the “Om” flag may be regarded as a religious symbol, the evidence in the instant case was not sufficient to establish that by the candidate for election, his agents or any other person with his consent or the consent of his election agent, “Om” flag was used or exhibited, or an appeal was made by the use of the “Om” flag to further the prospects of that candidate at the election. The burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant in the election petition to establish his case, and unless it is established in both its branches i.e., the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his consent for its practice not by preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt the petition must fail.

It is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed. Where however for conservation of language of the electorate appeals are made to the electorate and promises are given that steps would be taken to conserve that language, it will not amount to a corrupt practice.

Appeal from the Judgment and Order dated 31st May, 1963 of the Punjab High Court in First Appeal from Order No. 2/3 of 1963.

Purshotham Trikanidas, Senior Advocate (*Rajinder Nath Mittal*, *R. B. Datar*, *V. Kumar*, *B.P. Singh* and *Naunit Lal*, Advocates, with him), for Appellant.

G.S. Pathak, Senior Advocate (*Bawa Shiv Charan Singh*, *Hardev Singh*, *Rajendra Dhawab*, *Anand Prakash* and *T. Kumar*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Shah, J.—At the general elections held in February, 1962 five candidates contested the election to the House of the People from the Jhajjar parliamentary constituency. On 27th February, 1962 the appellant Jagdev Singh Sidhanti was declared elected. Pratap Singh Daulta who was one of the candidates at the election then filed a petition with the Election Commission praying, *inter alia*, that the election of the appellant be declared void on the ground that the appellant—Sidhanti—his agents, and other persons with his consent, had committed certain corrupt practices in connection with the election. Daulta stated that the appellant Sidhanti was set up as a candidate to contest the election by the Haryana Lok Samiti; that

the appellant and six other persons—Piare Lal Bhajnik, Ch Badlu Ram, Pt Budh Dev, Prof Sher Singh, Mahashe Bharat Singh and Acharya Bhagwan Dev who were leaders and active workers of the Gurukul section of the Arya Samaj had organised a political movement called "the Hindi agitation" in 1957 the real object of which was to promote feelings of enmity and hatred between the Sikh and Hindu communities in the State of Punjab "on the ground of religion and language" to promote their prospects in the general elections to be held in 1962 and for that purpose they held meetings in the Haryana region of the Punjab, and appealed to the electorate to vote for Sidhanti "on the ground of his religion and language" and used a religious symbol—a flag called "Om Dhvaj" in all these meetings, that the appellant himself made similar appeals to the electorate and appealed to them to refrain from voting for Daulta who was a sitting member of the House of the People from the constituency stating that he—Daulta—was an enemy in the Arya Samaj and of the Hindi language, that during the election campaign fifteen meetings were held between 10th December, 1961 and 18th February, 1962 and at all these meetings appeals were made to the electorate on the ground of religion and language of Sidhanti, and attempts were made to promote feelings of enmity and hatred between Sikhs and Hindus of the Punjab. Allegations about undue influence on the voters in the exercise of their free electoral right were also made in the petition, and details of these alleged corrupt practices were furnished in the schedule annexed to the petition.

Sidhanti denied that the six persons who were named as his agents and supporters ever acted as his agents in his election campaign and submitted that they were merely interested in the success of the candidates set up by the Haryana Lok Samithi and acted throughout "on their own and not as his agents". He also submitted that the Haryana Lok Samithi had no connection with the Arya Samaj, it being a political organization started by Prof Sher Singh who was an important political leader in the Haryana region. Sidhanti admitted that he had participated in the meetings or for the speeches made by others in those meetings, that the Om flag was not a religious symbol and denied that it was used on any occasion by him or his agents or the six persons named by Daulta in his petition, except Bhagwan Dev who was accustomed "throughout his career" to carry a pennant with "Om" and his own name inscribed thereon on his motor vehicle, but carrying of such a flag or pennant on Bhagwan Dev's vehicle during the election was not with his (Sidhanti's) consent and that it did not amount to commission of a corrupt practice as defined in the Act, that the residents of Haryana area were mainly Hindi speaking, but the Government of Punjab had made Punjabi language in Gurmukhi script a compulsory subject at various levels of school education and this gave rise to a wide spread agitation against the policy of Government, that to resist the implementation of the policy and the programme of the Government in the administrative, economic and developmental spheres and to mitigate the hardship, of the residents of the Haryana region and to secure redress of their grievances the Haryana Lok Samithi was formed, and an appeal to the electorate to secure a reversal of the policies and programme of the Government was not, it was submitted, an appeal on the ground of language or religion and did not amount to a corrupt practice within the meaning of section 123 of the Representation of the People Act, 1951.

The Tribunal held, *inter alia*, that the "Om flag" was not a "religious symbol" of the Arya Samaj, that no satisfactory proof was adduced that Om flag had been used as a symbol of Arya Samaj or that an appeal to secure votes with the aid of the flag was made to the electorate by Sidhanti or by any one else with his consent, that there was no satisfactory evidence to establish that appeals were made to the electorate to vote for Sidhanti or to refrain from voting for the other candidates on the ground of religion or language, and that the applicant Daulta failed to prove that an appeal on the ground of caste, community or religion or language had been made to the electorate to further the prospects of Sidhanti or to prejudicially affect election of the other candidates. On these, and findings recorded on other issues

not material in this appeal, the petition filed by Daulta was dismissed by the Election Tribunal.

Daulta preferred an appeal against that order to the High Court of Judicature for Punjab. The High Court held that the word "Om" is a religious symbol of the Hindus in general and of the Hindus belonging to the section known as Arya Samaj in particular and that the flag bearing the inscription "Om" is a religious symbol, that "Om Dhvaj" was flown during the election campaign on the election offices of the Hariana Lok Samiti especially at Sampla and Rohtak, that the Samiti office was used by Sidhanti for his election campaign, that Hariana Lok Samiti was generally using the "Om Dhvaj" to further the prospects of its candidates, that out of the agents and supporters of Sidhanti "Bharat Singh at least once and Bhagwan Dev invariably used" the Om flag on their vehicles while attending the meetings convened by the Hariana Lok Samiti in furtherance of the election campaign of Sidhanti, that the Om flag was flying "on the *pandal* of the meeting" held at Majra Dubaldhan on 19th January, 1962, when Sidhanti and his agents and supporters delivered speeches in support of the election campaign and that at the meeting held at Rohtak town, Piare Lal Bhajnik sang a song in the presence of Sidhanti the purport of which was that the honour of the Om flag should be upheld, that Bhagwan Dev was using the Om flag with the consent of Sidhanti and that Piare Lal Bhajnik at the Rohtak town meeting also sang the song in honour of the Om flag with the consent of Sidhanti. The High Court further held that the appellant has delivered speeches at Majra Dhubaldhan in the *pandal* on which the Om flag was flying, that as even an isolated act of the use of or appeal to the Om flag may constitute a corrupt practice under section 123 (3) that corrupt practice by Sidhanti and his agents and by his supporters with his consent was established. The High Court also held that Sidhanti had appealed for votes on the ground of his language and had asked the electorate to refrain from voting for Daulta on the ground of the language of the latter, and such appeals constituted a corrupt practice. The High Court accordingly allowed the appeal and declared the election of Sidhanti void under section 100 (1) (b) of the Act. Against the order this appeal is preferred with certificate granted by the High Court.

Two principal questions which survive for determination in this appeal are :

"(1) Whether a religious symbol was used in the course of election by the appellant, his agents or other persons with his consent in furtherance of the prospects of his election; and

(2) Whether appeals were made to the electorate by Sidhanti, his agents or other persons with his consent to vote in his favour on account of his language and to refrain from voting in favour of Daulta on the ground of his language."

In order to appreciate the plea raised by Counsel for the parties and their bearing on the evidence it may be useful to refer to the political background in the Hariana region, and the constituency in particular, in which corrupt practices are alleged to have been committed. The territory of the State of Punjab is divided into two regions,—The 'Hindi-speaking region' and 'the Punjabi-speaking region'. The Hindi-speaking region is very largely populated by Hindus, while in the Punjabi-speaking region the population is approximately equally divided between the Hindus and Sikhas. In the Punjab before the partition, Urdu and English were the two official languages. After the partition a controversy about the official language arose. The Government of Punjab decided to replace Urdu and English by Hindi in the Hindi-speaking region and Punjabi in the Punjabi-speaking region, and for that purpose a scheme called the 'Sachar formula' was devised, the salient feature of which was that every student, reading in the Punjab schools, by the time he passed his Matriculation examination should be proficient both in Hindi and Punjabi. Under the scheme two Regional Committees were formed—one known as the Hindi Regional Committee and the other the Punjabi Regional Committee. The function of the Committees was to advise the local Government in matters of finance and other related matters. There was great resentment against the formation of the Regional Committees and the implementation of the Sachar formula which resulted in the launching of a movement called "the Hindi agitation". The agitation

against the language policy of the Government gained strength and there was a great mass movement in 1957 in the entire State of Punjab. In the last week of December, 1957 there was a settlement between the organisers of the movement and the State Government and the movement was called off. It appears that some of the leading figures in this agitation attempted to make political capital out of this movement and set themselves up as probable candidates for the next election.

In the Arya Samaj in the Punjab there are two major sections, one called the 'Gurukul Section' and the other called the 'College Section'. The Gurukul Section is again divided into the Harijana Section and the Mahashe Krishna Section. It is the case of Daulta that it is the Gurukul Section of the Arya Samaj relying upon the religious and linguistic differences which sought to make at the time of the election appeals to religion and use of religious symbols. As we have already observed Daulta challenged the election on the ground that Sidhanti, his election and other agents committed many corrupt practices. Before the Tribunal he restricted his case to the corrupt practices falling within clauses (2), (3) and (3-A) of section 123 of the Representation of the People Act, 1951. His plea of undue influence falling within clause (2) failed before the Tribunal and also before the High Court and it has not been relied upon before us. Similarly his plea that Sidhanti, his election and other agents had promoted or attempted to promote, feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community or language was negatived by the Tribunal and also by the High Court and that plea also does not fall to be determined by us. Daulta had also alleged that appeals were made by Sidhanti and his election and other agents, to the electorate to vote for him or refrain from voting for Daulta on the ground of his—Sidhanti's—religion and language and that Sidhanti and his agents used and appealed to religious symbols such as the Om flag for the furtherance of the prospects of the election of Sidhanti and for prejudicially affecting the election of Daulta. It is on this last question about the use of and appeal to religious symbols and appeal to the language of the two candidates for the furtherance of the prospects of the election of Sidhanti that the Tribunal and the High Court have differed.

It may be useful to refer to the relevant provisions of the Act, before dealing with the matters in dispute. Section 100 (1) sets out the grounds on which an election may be declared void. In so far as that section is material in the present appeal, it provides—

"Subject to the provisions of sub-section (2) if the Tribunal is of opinion—

(a) * * * * *

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent,

(c) * * * * *

(d) * * * * *

the Tribunal shall declare the election of the returned candidate to be void."

By sub-section (2) if in the opinion of the Tribunal a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the Tribunal is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders and without the consent of the candidate or his election agent,

(b) * * * * *

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practice at the election, and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

the Tribunal may decide that the election of the returned candidate is not void. Section 123 sets out what shall be deemed to be corrupt practices for the purpose

of the Act. Clause (3) as amended by Act XL of 1961, which alone is material in this appeal, provides :—

“The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.”

The clause falls into two parts (i) an appeal by a candidate, his agents or by other persons with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language ; and (ii) use of or appeal to religious symbols, national symbols or national emblems for the furtherance of the prospects of the election of the candidate or for prejudicially affecting the election of any candidate. The first part in terms makes it a condition that the appeal is made by a candidate or his agent or any other person with the consent of the candidate or his agent. There is no reference in the second part to the person by whom the use of, or appeal to, the religious or the national symbols, such as the national flag or the national emblem may be made, if such use of or appeal to them has been made to further the prospects of the election of the candidate or to prejudicially affect the election of any candidate. But it is implicit in section 123 (3), having regard to the terms of section 100, that the use of or appeal to the national or religious symbols must be made by the candidate or his election agent or by some other person with the consent of the candidate or his election agent, before it can be regarded as a ground for declaring the election void. If the evidence on the record fails to establish the responsibility for the use of or appeal to the religious or national symbols by the returned candidate or by his election agent or by any other person with his consent or the consent of his election agent, no ground for setting aside the election may be deemed to be made out.

The first question to which we must then turn is, whether the “Om flag” can be regarded as a “religious symbol” within the meaning of section 123 (3). This question has to be examined in two branches—(i) whether the word “Om” has any special religious significance, and (ii) whether the use of “Om” on a flag or pennant makes it a religious symbol. If the respondent Daulta establishes that the “Om flag” is a religious symbol, the question will arise whether the use of or appeal to the Om flag was made in the election campaign for furtherance of his prospects by Sidhanti or by his agents or other persons with his consent or the consent of his election agent.

The expression “Om” is respected by the Hindus generally and has a special significance in the Hindu scriptures. It is recited at the commencement of the recitations of Hindu religious works. Macdonell in his “A practical Sanskrit Dictionary” states that “Om” is the sacred syllable used in invocations, at the commencement of prayers, at the beginning and the end of Vedic recitation, and as a respectful salutation ; it is subject of many mystical speculations. In the Sanskrit-English Dictionary by Monier-William it is said that “Om” is a sacred exclamation which may be uttered at the beginning and end of a reading of the Vedas or previously to any prayer : it is also regarded as a particle of auspicious salutation. But it is difficult to regard “Om” which is a preliminary to an incantation or to religious books, as having religious significance. “Om” it may be admitted is regarded as having high spiritual or mystical efficacy : it is used at the commencement of the recitations of religious prayers. But the attribute of spiritual significance will not necessarily impart to its use on a flag the character of a religious symbol in the context in which the expression religious symbol occurs in the section with which we are concerned. A symbol stands for or represents something material or abstract ; in order to be a religious symbol, there must be a visible representation of a thing or concept which is religious. To ‘Om’ high spiritual or mystical efficacy is undoubtedly ascribed ; but its use on a flag does not symbolise religion, or anything religious.

It is not easy therefore to see how the Om flag which merely is a pennant on which is printed the word 'Om' can be called a religious symbol. But assuming that the Om flag may be regarded as a religious symbol, the evidence on the record is not sufficient to establish that by Sidhanti, his election agents or any other person with his consent or the consent of his election agent, Om flag was used or exhibited, or an appeal was made by the use of the Om flag to further the prospects of Sidhanti at the election.

It may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches *i.e.*, the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail. The evidence may be examined bearing this approach to the evidence in mind.

Between the months of 10th December, 1961, and 18th February, 1962, four teen meetings were held in the constituency as a part of the election campaign of Sidhanti. These meetings were held at Beri, Barhana, Dighal, Akheri Madanpur, Sampla, Ladpur, Majra Dubaldhan, Pakasma, Assaudha, Jhajjar, Badli Dulehra, Sisana and Bahadurgarh. There was, it is claimed by the applicant, one more meeting on 4th February, 1962, at Rohtak town which is outside the Jhajjar constituency. The Tribunal held that the evidence was not sufficient to prove that in the meetings at Beri, Barhana, Dighal, Sampla, Ladpur, Pakasma, Assaudha, Jhajjar, Badli, Dulehra, Sisana and Bahadurgarh 'Om' flag was exhibited in furtherance of the election prospects of Sidhanti and with that view the High Court has agreed. The Tribunal also held that there was no reliable evidence that at Majra Dubaldhan on 19th January, 1962, and at Rohtak town on 4th February, 1962, 'Om' flag was used as a religious symbol. On this part of the case, however, the High Court disagreed with the Tribunal. Rohtak town was not, but Rohtak suburban area was, within the constituency in which Daulta and Sidhanti were contesting the election. Therefore the only meeting which took place within the constituency where Sidhanti and Daulta contested the election in which according to the High Court the Om flag was used was at Majra Dubaldhan held on 19th January, 1962. Six witnesses directly spoke about the details of that meeting, beside Sidhanti. Sidhanti said generally that the evidence given by the witnesses for Daulta regarding what transpired at Majra Dubaldhan and three other meetings was not true. The witnesses for Daulta were Roop Ram, Sukhi Ram and Ramdhari Balmiki. The witnesses who supported the case of the appellant were Piare Lal, Prof. Sher Singh and Jug Lal. It may be observed that the High Court placed no reliance upon the testimony of Ramdhari Balmiki and no arguments have been advanced before us suggesting that his testimony was reliable. Roop Ram—a Police Constable—has deposed that about mid-day on 19th, January 1962, a meeting was held at Majra Dubaldhan and that at that meeting Piare Lal sang a *bhajan* about the Om flag and he saw the Om flag flying on the *Pandal* of the meeting which was attended by four to five thousand persons. According to the witness Nanhu Ram, Badlu Ram, Jagdev Singh Sidhanti, Bhagwan Dev, Ramdhari Balmiki, Attar Singh, Prof. Sher Singh and Acharya Bhagwan Dev made speeches, that Acharya Bhagwan Dev in the course of his speech asked people not to vote for Daulta but to vote for the candidate who was seeking election on the Haryana Lok Samiti ticket. In cross-examination he admitted that he had been supplied with a copy of the report which he had made to the D.I.G., C.I.D., Chandigarh, and that he had gone through the report two or three times, before he gave evidence. The Tribunal refused to place reliance upon the testimony of this witness and of another Police Constable Ganesh Dass who claimed to have remained present in the various political meetings. It appears that the witness had memorised the so-called re-

ports and the same were not made available to counsel for Sidhanti to challenge the truth of the statements made by the witnesses. The High Court has not given any adequate reasons for accepting the testimony of the witness, when the Tribunal which had opportunity of seeing the witness and noting his demeanour had refused to accept the testimony.

Sukhi Ram deposed that he was a *sarpanch* of Dubaldhan *panchayat* for about two years, and that he was present at the meeting convened by the Haryana Lok Samiti on 19th January, 1962, for canvassing votes for the candidates of Haryana Lok Samiti, that Prof. Sher Singh and Sidhanti came in a jeep on which there was flying a flag with 'Om' inscribed thereon, that he saw several other vehicles flying the Om flag and that the vehicle in which he went to the meeting also was carrying the Om flag. The Tribunal was of the view that the facts elicited in the cross-examination of this witness disclosed that his recollection about other meetings which he had attended was poor, whereas his recollection about the meeting held at Majra Dubaldhan was very clear, and that the reasons given by the witness for specially remembering the details of the proceedings of the meeting in Majra Dubaldhan and not of other meetings could not be accepted. In the view of the Tribunal the witness was interested in Daulta, and this inference was supported by the fact that Daulta had sent him a copy of his election petition before it was even presented to the Election Commission. It also appears that the evidence given by this witness was inconsistent with the summary of the meeting given in Schedule 'D' to the petition and for this reason according to the Tribunal the testimony of the witness "did not carry conviction" and "it was not safe to rely upon it". The High Court after summarising the effect of the evidence observed that it did not appear from the deposition given by the witness that he was in any manner interested in Daulta. In so observing the High Court appears unfortunately to have lost sight of the grounds given by the Tribunal.

Witness Piare Lal stated that he was present at the meeting held at Majra Dubaldhan and that none of the speakers suggested that the electors should vote on the ground of caste, creed, religion or language. He also stated that at none of the meetings there was any Om flag either inside or outside the *pandal* of the meetings. Prof. Sher Singh who was another witness examined on behalf of Sidhanti deposed that slogans shouted in the meetings were political slogans and that he did not see Om flags in any *pandal* of the meetings, and that he had instructed all the candidates and the members of the Haryana Lok Samiti not to use any flag or symbol other than the symbol allotted to them. Jug Lal another witness examined on behalf of Sidhanti stated that at the meeting at Majra Dubaldhan on 19th January, 1962, there were no Om flags to be seen anywhere either inside or outside the meeting and that there were no Om flags flying on any of the vehicles. The testimony of the witnesses Piare Lal, Prof. Sher Singh and Jug Lal was discarded by the High Court, because in their view the witnesses were interested in Sidhanti. Even if this view about the evidence of these three witnesses is accepted, the evidence led on behalf of Daulta of witnesses Sukhi Ram, Ramdhari Balmiki is wholly unreliable and the testimony of Police Constable Roop Ram is also not such that implicit reliance can be placed upon it. We are unable therefore, to agree with the High Court in the conclusion it has reached that it had been proved satisfactorily that Om flag was flown at Majra Dubaldhan where Sidhanti and other speakers delivered speeches in furtherance of the election campaign.

The only other meeting at which it is found by the High Court that the Om flag was used is the meeting at Rohtak town on 4th February, 1962, which it is common ground, is not within the Jhajjar Parliamentary Constituency from which Sidhanti and Daulta were contesting the election. It is, however, said that Rohtak suburban area is within the Jhajjar Parliamentary Constituency and as there is a grain market in Rohtak town and a large number of voters from the Jhajjar constituency assemble in that town a meeting was held by Sidhanti in which Om flags were exhibited. The witnesses in support of the case of Daulta are Ram Nath Sapra, Dafedar Singh, K.K. Katyal and Satyarvat Bedi. The principal witnesses who

were examined by Sidhanti in respect of this meeting were Piare Lal, Bharat Singh, Budh Dev, Prof. Sher Singh and Bhagwan Dev.

Ram Nath Sapra who is a correspondent of several newspapers deposed that he had attended the meeting at Rohtak town at *Anaj Mandi* 10 or 12 days before the actual polling. According to the witness there was a big procession taken out before the meeting which carried flags either of the symbol of the Rising Sun or of 'Om', that he had made reports about the proceedings of the Rohtak meeting and had sent the report of the same to all the five papers of which he was the correspondent. The Tribunal was of the view that the testimony of the witness was unreliable, because he did not remember the details of any other meeting convened by the other parties, and that he could not speak about the names of the speakers who took part in the meeting convened by the Haryana Lok Samiti. The testimony of the witness therefore was "far from convincing" and the testimony of Sidhanti, Piare Lal, Bharat Singh, Budh Dev, Prof. Sher Singh and Bhagwan Dev was more reliable. In coming to the conclusion that the evidence of the witness was unreliable the Tribunal referred to the details given in Schedule 'D' annexed to the petition under the heading 'Summary of the meetings' and observed that the summary was at "complete variance" with the testimony of the witness. The High Court was of the view that the witness Ram Nath Sapra was "wholly disinterested" and therefore his evidence must be accepted. The High Court did not refer to the infirmities disclosed in the testimony of the witness, particularly the discrepancies between the statement of Daulta in his petition and the testimony given by this witness.

Witness Dafedar Singh who is a Police Constable said that he had been deputed to report about the proceedings of the meeting. His version is also different from the version as given in Schedule 'D' annexed to the petition. The High Court has not referred to the testimony of this witness in support of its conclusion and nothing more need be said about him.

K. K. Katyal said that he had attended the meeting at Rohtak town as a special correspondent of the '*Hindustan Times*,' Delhi and that he recollected that flags with a symbol of 'Om' inscribed thereon were seen flying on some vehicles but it was not possible for him to say who owned those vehicles, but from the flags and placards carried on the vehicles it appeared that they were of the Haryana Lok Samiti. He also deposed that he had gone to the office of the Haryana Lok Samiti at Rohtak and saw a similar flag flying on the building of the office. He admitted in cross-examination that he did not visit any office of the Haryana Lok Samiti either at Bahadurgarh or at Sampla as all his attention was confined to the central office of the Haryana Lok Samiti at Rohtak. He also stated that he had seen some shopkeepers in Sampla and Bahadurgarh flying Om flags on their stalls. In the view of the Tribunal the testimony of this witness was vague and no reliance could be placed thereon. While generally agreeing with this view, the High Court observed that the testimony of the witness Katyal that the Om flag was flying at the office of the Haryana Lok Samiti at Rohtak which was the headquarters office and in the procession which was led by Bharat Singh a number of Om flags were seen may be accepted.

Satyavart Bedi who is a staff correspondent of the '*Indian Express*' stated that during his survey of the election campaign he visited Sampla, Bahadurgarh and Rohtak in one day, and made his report about his observations to the newspaper '*Indian Express*', in which he had recorded that "religious symbols and religion were being frequently used for damaging the chances of success of" Daulta that he had seen a large number of flags fluttering on many house tops, that the flag on the office of the Haryana Lok Samiti was that of Om and the other organisations had their own flags that he saw the Om flag fluttering on the office of Sidhanti at Sampla but he did not remember whether there was any flag of 'Om' at his election office at Bahadurgarh. The Tribunal declined to accept this testimony. The High Court took a different view and observed that apart from any

other infirmity regarding the use of the reports made by the witness, the statement made by him about his observation that he had seen the Om flag flying on the office of the Hariana Lok Samiti and on the motor-vehicle of Bharat Singh could not be ruled out. It must be remembered however that we are concerned at this stage with the question whether in the meeting at Rohtak on 4th February, 1962, Om flags were exhibited. On that part of the case the evidence of Satyavart Bedi is not of much use.

Sri Ram Sharma was a candidate for election on behalf of a political party called "the Hariana Front". He deposed that he had never attended any procession or meeting organised by the Hariana Lok Samiti but he had seen the motor-vehicles employed by the Hariana Lok Samiti carrying Om flags which were used by the candidates of the Hariana Lok Samiti. He stated that he contributed a number of articles to Hariana Tilak, Rohtak, founded by him in which he had published on 4th January, 1962, an article condemning the use of the Om flag for the purpose of elections. The article published on 4th January, 1962, can have no bearing on the use of the Om flag at Rohtak in the meeting dated 4th February, 1962. The High Court did not place any reliance upon the testimony of this witness.

This is all the evidence on behalf of Daulta to which our attention was invited by counsel for the parties that at the meeting at Rohtak on 4th February 1962, Om flags were exhibited and appeals were made to the flag as a religious symbol. Apart from the general infirmity of the testimony, the Tribunal refused to accept the evidence of the witnesses on the ground that their statements considerably departed from the summary given in Schedule 'D' by the petitioner Daulta himself. In view of this inconsistency between the evidence given in Court and the allegations made by the applicant Daulta in the petition, it would be difficult, after discarding the evidence with regard to a very large number of meetings, to hold that in the meeting at Majra Dubaldhan which was within the constituency and in the meeting at Rohtak town which was outside the constituency, Om flags were displayed or appeals were made in the name of the Om flag to further the prospects of the election of Sidhanti. We are, therefore, unable to agree with the conclusion of the High Court that the Om flag was used for election purposes at the time when election speeches were delivered by Sidhanti at Majra Dubaldhan or Rohtak town or that the Om flag was used on the *pandals* at those meetings.

Two other matters which have a bearing on the use of the Om flag in the course of the election campaign by Sidhanti, and on which the High Court has relied may be referred to. The High Court has found that Sidhanti used the office of the Hariana Lok Samiti at Rohtak town as his election office, but on this part of the case our attention has not been invited to any definite evidence which directly supports this conclusion. The High Court merely observed that it was common ground that Sidhanti did not have any office of his own at Rohtak, and inferred from that circumstance that Sidhanti was using the office of the Hariana Lok Samiti for the election campaign. But the inference is in the face of the evidence not justifiable, especially when Rohtak town was not within the constituency.

It was conceded by Sidhanti that Bhawgan Dev Sharma an Arya Samaj leader had been accustomed for many years past to carry on his motor-vehicle a pennant bearing the Om mark and his name. Witness Bhagwan Dev Sharma stated that he had attended the meetings of the Hariana Lok Samiti and had addressed them because he agreed with their ideology and thought that the institution was for the benefit of the Hindu religion, that he had never been asked to remove the Om flag from his jeep when he reached those meetings and that he had not attended those meetings either on account of Prof. Sher Singh or Sidhanti but "in his independent capacity as a citizen of India having a right to vote", and that he approved of the candidature of Sidhanti in preference to that of his opponent. But if the witness was accustomed to use a pennant with Om mark on it for many years past, in the absence of clear evidence to show that he was an agent of Sidhanti or that he acted with the consent of Sidhanti and made an appeal to the flag, it would be difficult to hold from the circumstance that during the days of the election

campaign the witness did not remove the flag from the motor vehicle that Sidhanti made an appeal to the electorate by using a religious symbol to further his prospects at the election. The evidence about the use of the Om flag by Bharat Singh when he is alleged to have taken out a procession does not appear to be reliable.

On a careful survey of the testimony of the witnesses we are unable to agree with the conclusions recorded by the High Court that

(a) S dhanti had used an office of the Haryana Lok Samiti on which the Om flag was flying for election purposes and further that he gave election speeches at a *pandal* where the Om flag was fluttering in furtherance of his prospects at the election

(b) the agents and supporters delivered speeches about the 'Om flag' at the meeting held at Majra Dubaldhan on 19th January 1962 that Piare Lal Bahjrik sang a song the purport of which was that the honour of the Om flag should be upheld, and

(c) the Haryana Lok Samiti the party to which S dhanti belonged, was using the Om flag for the purpose of election campaign

and thereby committed corrupt practice. It is true that the use of the Om flag by Bhagwan Dev on his conveyance is admitted but that again is for reasons already set out not sufficient to enable the Court to hold that it was for the purpose of furthering the prospects of election of Sidhanti.

In considering whether appeals were made to the electorate to vote for Sidhanti¹ on the ground of his language or to refrain from voting for Daulta on the ground of Daulta's language it is necessary in the first instance to ascertain the true meaning of the expression "on the ground of his language". By section 123 (3) which was introduced for the first time in its present form by Act XL of 1961, appeal by a candidate or his agent to vote or refrain from voting for a person on the ground of language is made a corrupt practice. This clause must be read in the light of the fundamental right which is guaranteed by Article 29 (1) of the Constitution, for in ascertaining the true meaning of the corrupt practice the area of the fundamental right of citizen must be setadily kept in view. The clause cannot be so read as trespassing upon that fundamental right. Article 29 (1) provides

Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same

The Constitution has thereby conferred the right, among others, to conserve their language upon the citizens of India. Right to conserve the language of the citizens includes the right to agitate for the protection of the language. Political agitation for conservation of the language of a section of the citizens can not therefore be regarded as a corrupt practice within the meaning of section 123 (3) of the Representation of the People Act. That is clear from the phraseology used in section 123 (3) which appears to have been deliberately and carefully chosen. Unlike Article 19 (1), Article 29 (1) is not subject to any reasonable restrictions. The right conferred upon the section of the citizens residing in the territory of India or any part thereof to conserve their language, script or culture is made by the Constitution absolute and therefore the decision of this Court in *Jumuna Prasad Mukharya and others v Lachhi Ram and others*², on which reliance was placed by the High Court is not of much use. In that case sections 123 (3) and 124 (5) of the Representation of the People Act as they then stood were challenged as infringing the fundamental freedom under Article 19 (1) (a) of the Constitution, and the Court in negativing the contention held that the provisions of the Representation of the People Act did not stop a man from speaking. They merely prescribed conditions which must be observed if a candidate wanted to enter Parliament. The right to stand for an election is, it was observed, a special right created by statute and can only be exercised on the conditions laid down by the statute, and if a person wanted to stand for an election he must observe the rules. These observations have no relevance to the protection of the fundamental right to conserve language. The corrupt practice defined by clause (3) of section 123 is committed when an appeal is made either to vote or

refrain from voting on the ground of the candidate's language. It is the appeal to the electorate on a ground personal to the candidate relating to *his* language which attracts the ban of section 100 read with section 123 (3). Therefore it is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed. Where however for conservation of language of the electorate appeals are made to the electorate and promises are given that steps would be taken to conserve that language, it will not amount to a corrupt practice.

It is in the light of these principles, the correctness of the findings of the High Court that Sidhanti was guilty of the corrupt practice of appealing for votes on the ground of his language and of asking the voters to refrain from voting for Daulta on the ground of the language of Daulta may be examined. The petition filed by Daulta on this part of the case was vague. In paragraph 11 of his petition it was averred that Sidhanti and his agents made a systematic appeal to the audience to vote for Sidhanti and refrain from voting for Daulta "on the ground of religion and language", and in paragraph 12 it was averred that in the public meetings held to further the prospects of Sidhanti in the election, Sidhanti and his agents had made systematic appeals to the electorate to vote for him and refrain from voting for Daulta "on the ground of his religion and language". A bare perusal of the particulars of the corrupt practice so set out in paragraphs 11 and 12 are to be found in Schedules 'C' and 'D' clearly shows that it was the case of Daulta that Sidhanti had said that if the electorate wanted to protect their language they should vote for the Hariana Lok Samiti candidate. Similar exhortations are said to have been made by the other speakers at the various meetings. It is stated in Schedule 'D' that resolutions were passed at the meetings urging upon the Government to "abolish Punjabi from Hariana", that many speakers said that the Hariana Lok Samiti will fight for Hindi for Hariana and that they were opposed to the teaching of Punjabi in Hariana. These exhortations to the electorate to induce the Government to change their language policy or that a political party will agitate for the protection of the language spoken by the residents of the Hariana area do not fall within the corrupt practices of appealing for votes on the ground of language of the candidate or to refrain from voting on the ground of language of the contesting candidate.

Speeches made at political meetings held for canvassing votes must be examined in the context of the atmosphere of a political campaign and the passions which are generally aroused in such a campaign. In adjudging whether an appeal is made to the language of the candidate, a meticulous examination of the text of the speech in the serene atmosphere of the Court room picking out a word here and a phrase there to make out an offending appeal to vote for or against a candidate on the ground of language would not be permissible. A general and overall picture of the speeches delivered by Sidhanti and other speakers at the meetings disclosed nothing more than a tale of political promises, exhortations and inducements to vote at the forthcoming election for Sidhanti.

It is not disputed that in 1957 there was a wide-spread agitation in the State of Punjab against the enforcement of the education policy of the State, incorporated in the "Sachar formula." Many persons were imprisoned or detained in the cause of the agitation for individual acts done by them. But the movement was not and could not be declared illegal. It is common ground that in the Hariana region Hindi is the predominant language of the people and if a section of the people thought that compelling the students in the Hariana region to learn Punjabi was not in their interest and in the election campaign such a view was advocated and votes were canvassed on the promise that the candidate if elected will take steps to conserve the language of the region, it would be difficult to hold that appeal as amounting to a corrupt practice. It is open to a candidate in the course of his election campaign to criticise the policies of the Government including its language policy and to make promises to the electorate that if elected he will secure a reversal of that policy or will take measures in the Legislature to undo the danger, real, apprehended, or even fancied, to the language of the people. The object of the Hariana Lok

Samiti was evidently to resist the imposition of Punjabi in the Haryana region and that object appears to have been made the platform in the election campaign. Thereby it could not be said that the voters were asked not to vote for Daulta on the ground of his language, assuming that it was other than Hindi. Nor can it be said that it was an appeal to the voters to vote for Sidhanti on the ground of his language.

The evidence which has been referred to by the High Court regarding the speeches made by Badlu Ram and Harphul Singh on 10th December, 1961, at Beri on the face of it shows that the speeches were an attack against Daulta in respect of his political conduct, behaviour and beliefs. The speeches made at the meetings at Sampla, Ladpur and Majra Dubaldhan read like political harangues addressed to the electorate to vote for the candidate who would protect the language of the people of Haryana. At Bahadurgarh also Sidhanti is stated to have claimed that he was opposed to the Government and its supporter Daulta in the matter of the language movement. The evidence also showed that Sidhanti had appealed to the voters to vote for him because he was actively associated with the Hindi agitation movement and that he was championing the cause of Hindi and resisting the imposition of a rival language Punjabi and thereby suggesting that Daulta was hostile to the cause of Hindi language and was supporting the Punjabi language. The criticism by Sidhanti in his appeal to the electorate related to the political leanings of Daulta, and his support to the policy of the Government and was not personally directed against him. Nor did Sidhanti appeal to the voters to vote in his favour on account of his language. Such political speeches espousing the cause of a particular language and making promises or asking the people to protest against the Government of the day in respect of its language policy is not a corrupt practice within the description of corrupt practice under section 123 (3) of the Act.

We are therefore unable to agree with the High Court that Sidhanti was guilty of any corrupt practice under section 123 (3) by appealing for votes on the ground of his language or by asking the voters to refrain from voting for Daulta on the ground of his language.

The appeal will therefore be allowed and the order passed by the Tribunal restored with costs in this Court and the High Court.

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Appeal allowed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P.B. GAJENDRAGADKAR, Chief Justice, K.N. WANCHOO, K.C. DAS GUPTA, J.C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Brij Mohan Singh

*Appellant**

Priya Brat Naram Sinha and others

Respondents

Evidence Act (I of 1872), section 30—Scope—Illiterate public servant (Chowkidar) getting entry made as to birth of a person in book maintained by him by some other person—Entry if can be treated as one made by the public servant—Admissibility of such entry—Statement as to age in School Admission Register, Matriculation Certificate and an application for a Government post—Explanation that it was given to secure advantage in getting public service—Value of

The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. Accordingly an entry made in an official record of births maintained by an illiterate chowkidar, by somebody else at his request does not come within section 35 of the Evidence Act.

However much one may condemn an act of making a false statement of age in a School Admission Register with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. The explanation that such statement of age was made with a view to secure advantage in public service for which a minimum age for eligibility is

often prescribed, may very well be true and it will not be proper for the Court to base any conclusion about the age of a candidate for election on the entries in the School Admission Register, Matriculation Certificate or application for a Government post.

Appeal from the Judgment and Order dated 6th September, 1963 of the Patna High Court in Election Appeal No. 2 of 1963.

C.B. Agarwala, Senior Advocate (*L.M. Sarma* and *D.N. Mukherjee*, Advocates with him), for Appellant.

Sarjoo Prasad, Senior Advocate (*K.K. Sinha*, Advocate with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Das Gupta, J.—The appellant Brij Mohan Singh and the respondent Priya Brat Narain Sinha were among the candidates who contested the Aurangabad Constituency seat for the Bihar Legislative Assembly at the General Election held in 1962. The polling took place on 21st February, 1962. The appellant received a majority of votes and was declared elected. The respondent Priya Brat Babu who was the sitting member was defeated on 9th April, 1962, he filed a petition challenging the validity of the appellant's election. He prayed for a declaration that the election of the appellant Brij Mohan Singh be declared void and that he (Priya Brat Narain Sinha) be declared to have been duly elected to the Bihar Legislative Assembly from the Aurangabad Constituency. Among the grounds on which the appellant's election was challenged were these three :—

(1) That the appellant was born on 15th October, 1937, and was thus under 25 years of age on the date of filing the nomination papers and therefore disqualified under Article 137 of the Constitution from being a member of the Bihar Legislative Assembly;

(2) That he held subsisting contracts under the Bihar Government in his individual and personal capacity and was thus disqualified under section 7 (d) of the Representation of the People Act ;

(3) That the appellant, and with his consent, his party men Rameshwar Prasad Singh and others (whose names are mentioned) were directly responsible for publication and distribution of copies of leaflets containing direct insinuations and aspersions against the respondent's personal character, these being false to the knowledge of the appellant.

The Election Tribunal held on a consideration of the oral and documentary evidence produced before it that none of these or the other grounds on which the validity of the election was challenged had been established. Accordingly, the Tribunal dismissed the petition.

On appeal, the High Court of Judicature at Patna set aside the judgment and order of the Election Tribunal and made an order setting aside the election of the appellant Brij Mohan Singh to the Bihar Legislative Assembly. The High Court however refused the respondent's prayer to be declared duly elected.

Against this order of the High Court the present appeal has been preferred on a certificate granted by the High Court under Article 133 (1) (b) of the Constitution.

The only grounds that appear to have been pressed before the High Court were the three which we have mentioned above. The High Court agreed with the Election Tribunal that the allegation that the appellant held a contract under the Government in his personal capacity had not been established. As regards the other two grounds the High Court disagreed with the Election Tribunal. The High Court held that the appellant was below the age of 25 years on the date of filing the nomination and was therefore not qualified to be a candidate for the Bihar Legislative Assembly. The High Court also held that the appellant had published a leaflet Exhibit 10 containing attacks upon the personal character of the respondent and was thus guilty of a corrupt practice within the meaning of section 123 (4) of the Representation of the People Act. As already stated, the High Court set aside the election of the appellant.

The findings of the High Court on the question of age and also on the question of publication of the document Exhibit 10 have been challenged before us. It

was also urged that in any case the pamphlet Exhibit 10 did not amount to an attack on the personal character of the respondent

Both the parties adduced oral and documentary evidence on the question of age. While the respondent (the petitioner in the Election Petition) tried to prove that the appellant Brij Mohan Singh was born on 15th October, 1937, the appellant's attempt was to prove that he was born on 15th October, 1935. The oral testimony on either side is equally useless and unreliable. The three persons who gave evidence on behalf of the respondent to show that Brij Mohan Singh was born in 1937 are (1) Dharamdeo Singh, P W 6, (2) Ragho Naram Singh, P W 7 and (3) Ramjanam Singh, P W 61.

Dharam Deo Singh's story is that he met appellant's father Sarjoo on the Dusshera day in 1937 when he had gone to Aurangabad to see the immersion ceremony of goddess Durga and that at once Sarjoo gave him the good news that a son had been born to him on that day. He admits that he was no relation of Sarjoo nor does he claim to have been his friend. They did not even belong to the same village. It is not probable in these circumstances that Sarjoo would volunteer to this witness the news of the birth of a son to him. P W 7, Ragho Naram Singh, has also made a statement that Brij Mohan Singh was born on the Dusshera day of 1937. It is interesting to notice that he does not disclose from whom he got this information. He has said that he was Manager of Kunda Estate and Law Superintendent of Hasauli Estate in 1937 and attended the Tazui of these estates which used to be held on the Dusshera day in 1937. He has said that Sarjoo Singh came to the Tazui of the Hasauli Estate on that day in 1937 and stayed there till about 2 P.M. Assuming that one reads into his evidence a statement which he has refrained from making expressly, that Sarjoo told him about the birth of a son to him, we have to take note of the fact that Sarjoo was neither his friend nor relation. There is no explanation as to why Sarjoo would come and volunteer such a statement to him. It has to be noticed in this connection that this witness is President of Aurangabad Mandal Committee of the Congress and admittedly worked for the Congress before the election and did election campaign in Kunda in Aurangabad at the last General Elections for Priya Brat Babu who was the Congress candidate. It is not possible in these circumstances to place any reliance on his testimony. Ramjanam Singh, P W 61, who has also said that Brij Mohan Singh was born on Dusshera day in 1937 claims to be Brij Mohan's *mausera bhai*, i.e., Brij Mohan's mother's sister's son. He also claims to have been told about Brij Mohan Singh's birth on Dusshera day in 1937. It is interesting to note that although he claims to be such a close relation of Brij Mohan he could not give the name of Brij Mohan's sister. He also admitted his inability to give the year of birth of any member in Brij Mohan's family. Ultimately, he admitted in cross-examination that he did not know any one in Brij Mohan's family excepting Brij Mohan. But even about Brij Mohan he could not say in which year Brij Mohan was married and in which village. The last damaging statement which he made in cross-examination was that he had consultations with Priya Brat Babu about the evidence he had to give and that this consultation took place on 11th February, 1962, that is, even before the date of polling. This witness is therefore clearly a thoroughly unreliable witness. We have no doubt that he had no knowledge about Brij Mohan's date of birth and has deliberately given false evidence to help the petitioner, Priya Brat Naram Singh.

On behalf of the appellant evidence was given by his father Sarjoo Singh and several other persons to show that he was born in October, 1935. These witnesses are also all interested persons and though some of them were apparently more competent to give evidence about Brij Mohan's date of birth than the petitioner's witnesses, we find it difficult to base any conclusion on this question on their evidence. Nor can we find anything in the evidence of the witnesses which supports the petitioner's story that the appellant was born in 1937. The High Court seems to think that the statement of Mahesh Singh, R W 4, that Brij Mohan's father Sarjoo Singh was appointed a peon before the birth of Brij Mohan, taken with Sarjoo's own evidence that he was appointed a peon for the first time in 1936 lends

some support to the petitioner's case. We do not think it will be reasonable to attach much weight to Maheshi Singh's statement that Sarjoo was appointed a peon before Brij Mohan's birth. It has to be remembered that he was speaking of an event which took place between 25 and 27 years of age and could easily make a mistake as to sequence of the event of Brij Mohan's birth and the appointment of Sarjoo as a peon. In our opinion, it will be as unsafe to accept his statement that Sarjoo was appointed a peon before the birth of Brij Mohan as it would be to accept his evidence in examination-in-chief indicating that Brij Mohan was born in Kartik 1935. Besides all that, what his statement in cross-examination shows is that Brij Mohan was born in 1936 or thereafter; Brij Mohan would still be over 25 years of age on the date of nomination if he was born upto January, 1937 and this is not ruled out by this statement, even if any reliance can be placed upon it.

On an examination of the oral testimony on either side we are of opinion that no conclusion on the question of age can be based on that evidence.

It is proper to point out that the Tribunal which had the opportunity of seeing the witnesses rejected the evidence of the petitioners witnesses as untrustworthy, and did not also place any reliance on the testimony of the witnesses examined on behalf of the appellant. The High Court, which has clearly not accepted the evidence given on behalf of the appellant, has also not based its conclusion on the oral testimony given on behalf of the petitioner. It is true that it has ultimately accepted the petitioner's case; but that is on the basis of the documentary evidence, which we shall discuss later.

The Tribunal arranged for the appellant's medical examination as regards his age by the Civil Surgeon, Gaya, who was then examined as a Court witness. The witness gave evidence on the basis of the ossification of thyroid cartilage and the character of the third molar and other factors disclosed by X-ray examination of Brij Mohan. The Civil Surgeon's opinion was that Brij Mohan was 27 on the date of examination in 1962. We agree with the High Court that no value can be attached to this evidence.

This leaves for consideration the documentary evidence that has been adduced in the case.

The document on which the Election Tribunal mainly based its conclusion in favour of the appellant is a hath-chitha stated to have been maintained by the Chowkidar of the village Dabura Khurd where the appellant was born. In this document there is an entry purporting to show the date of birth of a son to Sarjoo Singh, a resident of the village Dabura Khurd on 15th October, 1935. It is nobody's case that this Sarjoo Singh, a resident of Dabura Khurd, was any other person than the appellant's father. It does not also appear to be disputed that the appellant was the eldest child of Sarjoo Prasad Singh. If this entry is available in law it would be a strong and indeed almost conclusive evidence of the appellant's case that he was born on 15th October, 1935. The High Court was however of opinion that this was a fabricated document brought into existence for the purpose of this case and further that it was not admissible in evidence in the circumstances of the case. In view of the difference of opinion between the Election Tribunal and the High Court as regards the genuineness of this document we have examined it closely and carefully. We do not think the High Court's conclusion that the document (hath-chitha) was fabricated for the purpose of this case is justified on the materials on the record.

The document was produced before the Tribunal by Jogeshwar Dusadh Chowkidar (R.W. 58). It appears that a summons was first sent to him at the instance of the appellant for appearance in Court with the hath-chitha of the Village Dabura Khurd for the years 1934 to 1936. He did not obey that summons. A warrant was then issued for the arrest and production of the Chowkidar before the Tribunal along with these hath-chithas. This warrant was executed on 19th September.

The Chowkidar was arrested and produced before the Tribunal the following day through a lawyer the hath-chitha book which has later been marked as Exhibit K. Giving evidence on oath on 5th November, 1962, he has said that he was working as a Chowkidar of Dabura village for the last 33 years and that when Sarjoo Singh's eldest son Brij Mohan Singh was born he got an entry about his birth made in this hath chitha book. As he is illiterate he used to have the entries in the hath-chitha book made during this period by Ganpat Singh and Khelawan Singh. The judgment of the High Court states that 'this witness appears to be a lying witness in view of the numerous statements elicited from him in cross-examination' that it appeared that this witness was suborned to depose in favour of Brij Mohan Singh at a late stage and that the hath-chitha was brought into existence subsequently to lend support to his case.

One reason given by the High Court for doubting the genuineness of the document is that the hath-chitha bahu should have been deposited in the Police Station after it had been exhausted and should not have been in the custody of the Chowkidar. Another reason given is that Azim Khan or S K Sahai whose endorsement appeared in the hath-chitha were not shown to have been officers in-charge of the Police Station at the relevant time. Yet another reason for the High Court's suspicion about the genuineness of the hath-chitha book appears to be that Ganpat Singh and Khelwan Singh whose handwritings the book is said to contain are both dead. The fact that the Chowkidar did not disclose to the Sub-Inspector, at the time of the execution of the warrant of arrest, that the hath chitha was with him, is stated as a further reason for thinking that it was brought into existence at a later stage. None of these reasons bear scrutiny. We have gone through all the statements made by this witness in cross-examination and do not find anything to justify the High Court's characterisation of the witness as 'a lying witness'. We see nothing surprising or suspicious in that two persons Ganpat and Khelawan whose statements the document is said to contain are dead. It has to be remembered that the entries are claimed to have been made about more than 25 years ago. Even if Ganpat and Khelawan Singh were young people then one need not feel surprised that they are dead now. Nothing has been shown to us that the rules required the hath-chitha book to be deposited in the Police Station after it was exhausted. The fact that the Chowkidar did not disclose to the Sub-Inspector at the time of his arrest that he had this document with him is also easily explained. It was not difficult for him to understand that important and influential persons set great store by this document so that he thought the wisest course for him would be to produce it in Court through a lawyer. It also appears to us to be of little consequence that Azim Khan and S K Sahai have not been shown to be officers-in-charge of the Police Station at the relevant time. For it is not unusual that some other Police Officer, though he is not the officer-in-charge, would put his initials on the hath-chitha book. It may be mentioned in this connection that Respondent's Witness No. 64 Osmond—a retired Inspector of the Bihar police—said that Azim Khan was an Assistant Sub-Inspector attached to Aurangabad Thana in 1935. He has, it is true, also said about S K Sahai that he was not attached to Aurangabad Thana in 1934. It has to be remembered however that this witness himself had nothing to do with the Aurangabad Thana at the time and that he has admitted that he did not know S K Sahai. It will not be proper therefore to base on his evidence a conclusion that S K. Sahai was not an officer of the Aurangabad Thana during the period for which his initials appear on the hath-chitha book.

On an examination of the physical appearance of the hath-chitha and the entries made therein, the evidence of the Chowkidar and the circumstances under which this document was ultimately produced before the Tribunal we are inclined to agree with the view of the Election Tribunal that this is a genuine document which was maintained by the Chowkidar in the discharge of his official duty. If the document had been manufactured to assist the appellant we do not think it likely that the Chowkidar would have refused to produce it readily when sum-

moned to do so. The fact that a warrant of arrest had to be executed against him is a convincing circumstance that the Chowkidar was unwilling to produce it. We are not impressed by the argument of Mr. Sarjoo Prasad that the omission of the Chowkidar to produce the document in obedience to the summons and the issue of warrant of arrest to secure its production were all pre-arranged to create an atmosphere for the acceptance of the document as genuine. The appellant's lawyers before the Election Tribunal could not possibly have been sure that the Tribunal would in the last resort issue a warrant of arrest. It is not likely that they would take such risk so that the document might not come at all.

In our opinion, this document is genuine and is the book that was maintained by the Chowkidar for noting the births in his Ilaka during the years 1934 to 1936. The entry therein showing the birth of a son to Sarjoo Singh on 15th October, 1935, can however be of no assistance to the appellant unless this entry is admissible in evidence under the Evidence Act. If this entry had been made by the Chowkidar himself this entry would have been relevant under section 35 of the Evidence Act. Admittedly, however, the Chowkidar himself did not make it. Mr. Agarwal tried to convince us that when an illiterate public servant is unable to make an entry himself and he gets the entry made by somebody else this should be treated as an entry made by the public servant. This argument must be rejected. The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. We have therefore come to the conclusion that the High Court is right in holding that the entry made in an official record maintained by the illiterate Chowkidar, by somebody else at his request does not come within section 35 of the Evidence Act. It is not suggested that the entry is admissible in evidence under any other provision of the Evidence Act. The entry in the hath-chitha has therefore to be left out of consideration in coming to a conclusion about the appellant's age.

Strong reliance was placed on behalf of the petitioner-respondent on three documents Exhibit 2, Exhibit 8 and Exhibit 18. The first of these is the admission register of Aurangabad Town School where the appellant took his admission as a student on 19th January, 1946. In the entry as regards his admission in the register the date of birth is shown as 15th October, 1937 and the age as eight years, three months and three days. The second Exhibit (Exhibit 8) is an application made by the appellant on 26th August, 1959, for the post of a Sub-Inspector of Police. Here also the date of birth is shown as 15th October, 1937. The third document is Exhibit 18. It is a certificate issued by the Bihar School Examination Board for his passing the Matriculation Examination. This also states the date of birth as 15th October, 1937.

An objection was faintly raised by Mr. Agarwal as regards the admissibility of Exhibit 2 on the ground that the register is not an official record or a public register. It is unnecessary to consider this question as the fact that such an entry was really made in the admission register showing the appellant's date of birth as 15th October, 1937, has all along been admitted by him. His case is that this was an incorrect statement made at the request of the person who went to get him admitted to the school. The request was made, it is suggested, to make him appear two years younger than he really was so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The appellant's case is that once this wrong entry was made in the admission register it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of a Sub-Inspector of Police. This explanation was accepted by the Election Tribunal but was rejected by the High Court as untrustworthy. However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a

judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration we are of opinion that the explanation may very well be true and so it will not be proper for the Court to base any conclusion about the appellant's age on the entries in these three documents, viz, Exhibit 2, Exhibit 8 and Exhibit 18.

On an examination of the entire evidence, oral and documentary, we therefore reach the position that the petitioner respondent has not been able to prove that the appellant Brij Mohan was below 25 years of age on the date of filing of nomination papers while the appellant himself has also not been able to show that he was at least 25 years of age on that date. It cannot be disputed and is not disputed that the burden of proving that the appellant's age was below 25 years on the date of his nomination was on the petitioner respondent. The petition in so far as it is based on the ground that the appellant was below 25 years of age on the date of his nomination must therefore fail.

This brings us to the question of the alleged commission of a corrupt practice under section 123 (4) of the Representation of the People Act. The petitioner's case was that the pamphlet Exhibit 10 contained statements in relation to his personal character reasonably calculated to prejudice the prospects of his election, that these statements were false and the appellant either believed them to be false or did not believe them to be true and that this was published by Brij Mohan himself and also by other persons with his consent. To prove such publication the petitioner relied strongly on the testimony of some witnesses who spoke of the distribution of such pamphlets in Bazaars and other places in the constituency and even more strongly on the evidence to the effect that the order for printing these pamphlets was given to the press by Brij Mohan's agent, Rameshwar Prasad Singh, that Brij Mohan paid for it and that the manuscript itself was in Brij Mohan's own handwriting. The oral testimony about the distribution of the pamphlets is of very little value. We have examined the evidence of each of these witnesses and find that the comment of the Election Tribunal that they have given the story in a parrot-like manner is justified. They are all partisan witnesses and could easily be induced to give such evidence falsely. The Election Tribunal found them unworthy of credit. It does not also seem that the High Court was prepared to rely on this evidence by itself. The High Court was, however, convinced from the evidence of the proprietor of the press who gave evidence as Court Witness No. 2 that this pamphlet was printed under Brij Mohan's orders and was paid for by him, and only in view of this conclusion it considered the evidence of the witnesses examined on behalf of the petitioner respondent to be "fairly strong."

There can be no doubt that this pamphlet Exhibit 10 was printed at the Gokul Press, Aurangabad, Gaya. Sheonandan Prasad is the proprietor of this press and was its proprietor in February, 1962, when this pamphlet was printed. He has produced the order book of the press and indicated the Entry No. 62 in that book as the entry in respect of the printing of this pamphlet at his press. He also produced the manuscript from which the pamphlet was printed. It is interesting to notice that this witness did not appear before the Tribunal on 27th August 1962 in spite of the service of two summonses on him to appear on that date. It was when a notice was served on him to show cause why he should not be prosecuted under section 174 of the Indian Penal Code that he appeared before the Tribunal. That was on 31st August, 1962. Then on 3rd September, 1962, he showed cause against his prosecution. Thereafter on 4th September, 1962, he produced the order book of his press and the document said to be the manuscript for the pamphlet. As Entry No. 62 in the order book now stands, it purports to show that this pamphlet with the words 'Bagula Neta Se Hoshiar' was printed there. For, under the words indicating the place of residence of the person who gave this order these words 'Bagula Neta Se Hoshiar' appear. They are however in different ink from the rest of the handwriting in that entry and are clearly an interpolation. Sheonandan himself admits that he inserted these words before filing the book.

before the Tribunal either on 3rd September, 1962, or on 4th September, 1962. He further made a significant admission in these words :

"Because of the request of Naulah Singh I made the insertion in the Register some time on the 3rd or 4th of September so that the member may easily understand the order in the Register by which the said parody was ordered to be printed."

Naulakh is admittedly one of these who worked for the respondent during the election. It is not possible to accept a witness who has admittedly made a false document in the manner as a witness of truth. The fact that he confessed having made the interpolation does not improve his credibility.

It is also worth noticing that this Entry No. 62 mentions three kinds of things as printed :—(1) 1,000 copies of poster ; (2) 2,000 copies of notice and (3) 2,000 copies of ballot papers. The pamphlet Exhibit 10 is clearly not included in the terms "poster" ; it is certainly not a ballot paper ; and it will hardly be right to call it a notice.

On a consideration of all the circumstances we are of opinion that no reliance can be placed on his testimony and no conclusion can be based on his evidence as regards the printing of this pamphlet under orders from the appellant.

Naulakh who is another witness who has tried by his evidence to connect Brij Mohan with the printing of this pamphlet, is equally untrustworthy. He stated that during the first week of February, 1962 when he went to Gokul Press Aurangabad he found Rameshwar Prasad Singh there and saw in Rameshwar Prasad's hand a manuscript similar to this pamphlet and that in his presence Rameshwar Prasad placed orders for printing this parody in the press. He says that he read the manuscript and thus understood that it was directed against Priya Brat Babu. He could not however remember for what purpose he visited Gokul Press on that day. This, one has to remember is the witness at whose request Sheonandan, the Proprietor of the Gokul Press made the interpolation in the order book. No reliance can be placed on the evidence of such a witness.

It is interesting to notice that though some document was produced in Court by Sheonandan as the manuscript from which the pamphlet had been printed and it was the petitioner's case that this document was in Brij Mohan's own handwriting no attempt was made to prove the identity of the writer by examining a handwriting expert or otherwise.

P. N. Singh (P. W. 60) who claims to have seen the manuscript of Exhibit 10 in the Gokul Press in January, 1962, and states that this manuscript was in Brij Mohan's own hand-writing was not even recalled to identify the writing of the document that was produced by Sheonandan as the manuscript, as Brij Mohan's.

On a consideration of the entire evidence we are of opinion that the petitioner-respondent has not been able to prove the publication of this pamphlet Exhibit 10 by the appellant or his agent or by any other person with the consent of the appellant or his election agent. We therefore accept as correct the conclusion of the Election Tribunal that the commission of any corrupt practice by the appellant under section 123 (4) of the Representation of the People Act has not been proved and that the contrary view taken by the High Court is wrong.

In view of our conclusion on the question of publication we have not thought it necessary to examine whether the other ingredients of a corrupt practice under section 123 (4) were established.

As neither of the two grounds on which the High Court based its conclusion can be sustained, the High Court's order allowing the Election Petition must be set aside.

Accordingly, we allow the appeal, set aside the order of the High Court and restore the order of the Election Tribunal dismissing the election petition. The appellant will get his costs from respondent No. 1 throughout.

K.S.

THE SUPREME COURT OF INDIA

(Original Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO, K C DAS GUPTA, J C SHAH AND N RAJAGOPALA AYYANGAR, JJ

R. L. Arora

.. Petitioner*

v

The State of Uttar Pradesh and others

.. Respondents

Patel Mangalbhair and others and Kaira District Co-operative Milk Producers' Union Ltd

Interveners

Land Acquisition Act (I of 1894) section 40 (1) (aa) (inserted by Act XXXI of 1962)—Scope and validity—Section 7 of the Amending Act—Validity—Constitution of India (1950), Articles 14 19 (1) and 31 (2)—If contravened

It is well settled that if certain provisions of law construed in one way will be consistent with the Constitution and if another interpretation would render them unconstitutional the Court would lean in favour of the former construction.

Clause (aa) inserted in section 40 (1) of the Land Acquisition Act by Act XXXI of 1962 does not permit acquisition of land for construction of some building or work for a company engaged or to be engaged in an industry or work which is for a public purpose unless the building or work for which the land is acquired also subserves the public purpose of the industry or work in which the company is engaged. This is the better construction of clause (aa) taking into account the setting in which it appears and the circumstances in which it came to be enacted and the words used therein. If this is the true construction of clause (aa) it cannot be said to contravene Article 31 (2) for the public purpose required therein is present where land is required for the construction of a building or work which must subserve the public purpose of the industry or work in which a company is engaged or is about to be engaged. Nor can it be said that the provision is hit by Article 19 (1) (f) for it would be a reasonable restriction on the right to hold property. The amendments to section 41 of the Act are only consequential to the insertion of clause (aa) in section 40 (1). The provisions are valid and constitutional.

Section 7 of the Amending Act only provides that where the purpose of the acquisition does not fall under clause (a) or clause (b) of section 40 (1) it shall be deemed to fall under clause (aa) and to be judged in accordance therewith. If in fact the purpose of any acquisition made before 20th July 1962, is such as does not fall within clause (aa) the deeming provision would be of no avail. The attack on section 7 of the Amending Act under Article 14 as well as Article 31 (2) must fail, for in neither case can acquisition be valid whether made before 20th July 1962, or thereafter unless the conditions of clause (aa) are satisfied.

A distinction in the matter of acquisition of land between public companies and government companies on the one hand and private individuals and private companies on the other is justified considering the object behind clause (aa) as introduced in the Act.

There being a definite public purpose behind the acquisition in the present case the acquisition would be justified under the Act irrespective of the intention of the previous owner of the land to use it for some other public purpose.

Per Rajagopala Ayyangar J—The only way to read clause (aa) is to relate the words 'public purpose' to the nature of the industry carried on by the company and by no rule of construction with or without extrinsic aids or with reference to the context not to speak of rules of grammar can the reference to public purpose be related to the building or work for which the acquisition is permitted to be made. In clause (aa) there is no purpose indicated at all, except that it is needed for a company which falls within a particular category. Clause (aa) is unconstitutional as violative of Article 31 (2).

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights

C B Agarwala, Senior Advocate, (Mr Naumit Lal, Advocate, with him), for Petitioner

M C Setalvad, Senior Advocate, (C P Lal, Advocate, with him), for Respondent No 1

C K Daphary, Attorney-General for India and N S Bindra, Senior Advocate, (R H Dhebar, Advocate, with them), for Respondent No 2

M C Setalvad, Senior Advocate, (M S Devendra Swarup and J P Goyal, Advocates, with him), for Respondent No 3

I. M. Nanavati, Advocate, and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Intervener No. 1.

Rajani Patel and *I. N. Shroff*, Advocates, for Intervener No. 2.

The Court delivered the following Judgments

Wanchoo, J. (on behalf of the majority).—The petition under Article 32 of the Constitution is a sequel to the judgment of this Court in *R. L. Arora v. State of U.P.*¹. The Petitioner is the owner of certain lands in village Nauraiya Khera, in the district of Kanpur. He got information in May, 1956 that steps were being taken to acquire nine acres of his land for an industrialist in Kanpur. He therefore, wrote to the Collector of Kanpur in that connection. On 25th June, 1956, however, a notification was issued under section 4 of the Land Acquisition Act 1 of 1894 (hereinafter called the Act), stating that the land in dispute was required for a company for the construction of textile machinery parts factory by Lakshmi Ratan Engineering Works Limited, Kanpur. This order was followed on 5th July, 1956, by a notification under section 6 of the Act, which was in similar terms. This notification also provided for the Collector to take possession of any waste or arable land forming part of the land in the Schedule to the notification immediately under the powers conferred by section 17 (1) of the Act. On 31st July, 1956, the Collector took possession of the land and handed it over to the company along with some constructions standing on it. In the meantime, the petitioner filed a writ petition in the High Court on 31st July, 1956, praying that the notification under section 6 of 5th July, 1956, be quashed and also applied for interim stay. As however possession had already been taken on 31st July, 1956, the application for interim stay became infructuous. One of the main grounds in support of the writ petition of 31st July, 1956, was that sections 38 to 42 of the Act had not been complied with. Thereafter steps were taken by the State Government to comply with the provisions of sections 38 to 42 of the Act and an agreement was entered into between the Government and the company in August 1956 and was published in the Government Gazette on 11th August, 1956. This was done without making any enquiry either under section 5-A or section 40 of the Act. Therefore on 14th September, 1956, an inquiry was ordered by the Government under section 40. The enquiry was accordingly made and the enquiry officer submitted a report on 3rd October, 1956. This was followed by a fresh agreement between the Government and the company on 6th December, 1956. On 7th December, 1956 a fresh notification was issued under section 6 of the Act after the formalities provided under sections 38 to 42 had been complied with. Thereafter a fresh notice was issued under section 9 of the Act and it appears that possession was formally taken again after 2nd January, 1957.

A fresh writ petition was filed by the petitioner before the High Court on 29th January, 1957, in view of the fresh action taken by the State Government and the main ground taken in this petition, was that the notification was invalid as it was not in compliance with section 40 (1) (b) of the Act read with the fifth clause of the matters to be provided in the agreement under section 41. The petitioner failed in the High Court. Thereafter he came by Special Leave to this Court. This Court decided on a construction of section 40 (1) (b) read with the fifth clause of the matters to be provided in the agreement under section 41 that these provisions had to be read together and required that the work should be directly useful to the public and that the agreement should contain a term as to how the public will have the right to use the work directly. The provision as to access to land or works for those having business with the company or the fact that the product would be useful to public, was not considered sufficient to bring the acquisition for a company within the meaning of the relevant words in sections 40 and 41. The appeal therefore was allowed on 1st December, 1961, and the last notification under section 6 was quashed. see *R.L. Arora's case*¹.

1. (1962) Supp. 2 S.C.R. 149 : (1963) 1 A.W.R. (S.C.) 23; A.I.R. 1962 S.C. 764. S.C.J. 33 : (1963) 1 M.L.J. (S.C.) 23; (1963)

On 20th July, 1962, the Land Acquisition (Amendment) Ordinance 1962 (III of 1962) was promulgated by the President of India. By that Ordinance, sections 40 and 41 of the Act were amended and certain acquisitions of land made before the date of the Ordinance were validated notwithstanding any judgment, decree or order of any Court. The Ordinance was replaced by the Land Acquisition (Amendment) Act, XXXI of 1962, (hereinafter referred to as the Amendment Act), which was made retrospective from 20th July, 1962, the date on which the Ordinance was promulgated. This Act made certain amendments in sections 40 and 41 of the Act and validated certain acquisitions. The present petition challenges the validity of the amendments to sections 40 and 41, and also the validity of section 7 of the Amendment Act by which certain acquisitions made before 20th July 1962, were validated. It is therefore necessary to read the amendments made in sections 40 and 41 of the Act as well as section 7 of the Amendment Act. In section 40 (1) of the Act a new clause was inserted in these terms —

(aa) that such acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose

Section 41 was amended to read as below —

41. If the appropriate Government is satisfied after considering the report if any of the Collector under section 5-A sub-section (2) or on the report of the officer making an inquiry under section 40 that the proposed acquisition is for any of the purposes referred to in clause (a) or clause (aa) or clause (b) of sub-section (1) of section 40 it shall require the company to enter into an agreement with the appropriate Government providing to the satisfaction of the appropriate Government for the following matters, namely:—

| | | | |
|-----|-----|-----|-----|
| (1) | *** | *** | *** |
| (2) | *** | *** | *** |
| (3) | *** | *** | *** |
| (4) | *** | *** | *** |

(4 A) Where the acquisition is for the construction of any building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose the time within which and the conditions on which the building or work shall be constructed or executed and

| | | | |
|-----|-----|-----|-----|
| (5) | *** | *** | *** |
|-----|-----|-----|-----|

Section 7 of the Amendment Act, which validated certain acquisitions reads as follows —

Notwithstanding any judgment, decree or order of any Court, every acquisition of land for a company made or purporting to have been made under Part VII of the principal Act before the 20th day of July 1962 shall in so far as such acquisition is not for any of the purposes mentioned in clause (a) or clause (b) of sub-section (1) of section 40 of the principal Act be deemed to have been made for the purpose mentioned in clause (aa) of the said sub-section, and accordingly every such acquisition and any proceeding, order, agreement or action in connection with such acquisition shall be and shall be deemed always to have been as valid as if the provisions of sections 40 and 41 of the principal Act as amended by this Act were in force at all material times when such acquisition was made or proceeding was held or order was made or agreement was entered into or action was taken.

Explanation— *** **** ***

Besides these amendments which require consideration in the present petition sections 44 A, and 44 B were also inserted in the Act providing for restriction on transfer etc., (section 44 A) and making certain provisions forbidding acquisition of land for a private company other than a government company (section 44-B). It is however not necessary to set out the terms of these new sections.

The present petition challenges the validity of the amendments to sections 40 and 41 of the Act and also of section 7 of the Amendment Act, and the challenge is made in this way. It is submitted that the amendments made to sections 40 and 41 of the Act are *ultra vires*, as they contravene Article 31 (2) and Article 19 (1) (f) of the Constitution. The argument is that on a construction of the amendment to section 40 by which clause (aa) has been introduced therein, it is provided that all acquisitions made for a company for construction of some building or work are

permissible even though the building or work for the construction of which the acquisition is made may not be for a public purpose, as the new clause (aa) merely requires that the company which is applying for acquisition is engaged or is taking steps for engaging itself in any industry or work, which is for a public purpose. It is urged that all that this clause requires is that the company for which the acquisition is being made should be engaged in any industry or work which is for a public purpose and in that case it can acquire land under this clause even though the particular building or work for the construction of which land is acquired may not be for a public purpose. Therefore the new clause (aa) which permits such acquisition contravenes Article 31 (2) which lays down that no property shall be compulsorily acquired save for a public purpose and also Article 19 (1) (f) as such acquisition would amount to an unreasonable restriction on the fundamental right to hold property.

The validity of section 7 of the Amendment Act is attacked on the ground that it contravenes Article 31 (2) and Article 14 of the Constitution inasmuch as it makes acquisition for a company before 20th July, 1962, as being for a public purpose even though it may not be so in fact and thus raises an irrebuttable presumption of public purpose by fiction of law and so contravenes Article 31 (2) which requires that there must be an actual public purpose before land can be compulsorily acquired. And it also contravenes Article 14 inasmuch as it makes a discrimination in the matter of acquisitions for a company before 20th July, 1962, and after 20th July, 1962, insofar as the former acquisitions are validated on the basis of their being deemed to be for a public purpose while the latter acquisitions are not so deemed and have to satisfy the test of public purpose.

Besides the attack as to the *vires* of these provisions in the Amendment Act, it is urged that the rights of the petitioner cannot be affected by the validating provision in the Amendment Act as section 7 of the Amendment Act does not reopen decided cases and does not revive notifications or acquisitions struck down by Courts. Lastly, it is urged that the acquisition in the present case cannot be said to be for a public purpose inasmuch as (firstly) the agreement between the company and the Government does not regulate or control the products of the company in the interest of the public; and (secondly) the petitioner's land which was intended to be used for one public purpose is being taken away for another such purpose. We shall deal with these contentions *seriatim*.

The first question that falls for consideration is the construction of clause (aa) of sub-section (1) of section 40 of the Act. The amendments to section 41 are consequential and will stand or fall with clause (aa) inserted in section 40 (1). It is contended on behalf of the petitioner that on a literal construction of this clause (which, it is urged, is the only possible construction) it requires that the company which is acquiring the land should be engaged or should be taking steps for engaging itself in any industry or work, which is for a public purpose. If a company satisfies that requirement it can acquire land for the construction of some building or work, even though that building or work may not itself subserve such public purpose. Therefore, the argument runs that clause (aa) permits compulsory acquisition of land for a purpose other than a public purpose and is hit by Article 31 (2) of the Constitution, whereunder land can be compulsorily acquired only for a public purpose. It may be conceded that on a literal construction the adjectival clause, namely, "which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose", qualifies the word "company" and not the words "building or work" for the construction of which the land is needed. So *prima facie* it can be argued with some force that all that clause (aa) requires is that the company for which land is being acquired should be engaged or about to be engaged in any industry or work which is for a public purpose and it is not required that the building or work, for the construction of which land is acquired should be for such public purpose.

In approaching the question of construction of this clause, it cannot be forgotten that the amendment was made in consequence of the decision of this Court in *R.L.*

*Arora's case*¹, and the intention of Parliament was to fill the lacuna, which, according to that decision, existed in the Act in the matter of acquisitions for a company, nor can it be forgotten that Parliament when it enacted the Amendment Act was aware of Article 31 (2) of the Constitution which provides that land can only be acquired compulsorily for a public purpose and not otherwise. It could not therefore be the intention of Parliament to make a provision which would be in contravention of Article 31 (2), though it may be admitted that if the language used is capable of only one construction and fails to carry out the intention of Parliament when making the amendment, the amendment may have to be struck down if it contravenes a constitutional provision. Further, a literal interpretation is not always the only interpretation of a provision in a statute and the Court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute. It is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention of the law making body which may be apparent from the circumstances in which the particular provision came to be made. Therefore, a literal and mechanical interpretation is not the only interpretation which Courts are bound to give to the words of a statute, and it may be possible to control the wide language in which a provision is made by taking into account what is implicit in it in view of the setting in which the provision appears and the circumstances in which it might have been enacted. We may in this connection refer to a decision of this Court in *The Mysore State Electricity Board v The Bangalore Woollen, Cotton and Silk Mills Ltd*², where the words used in section 76 (1) of the Electricity (Supply) Act of 1948 fell for interpretation, and this Court held that even though the words used were of wide amplitude, it was implicit in the sub-section that the question arising thereunder was one which arose under the Electricity (Supply) Act. Therefore, we have to see whether the provision in clause (aa) bears another construction also the setting in which it appears and in the circumstances in which it was put on the statute book and also in view of the language used in the clause. The circumstances in which the amendment came to be made have already been mentioned by us and the intention of Parliament clearly was to fill up the lacuna in the Act which became evident on the decision of this Court in *R.L. Arora's case*¹. Parliament must also be well aware of the provisions of Article 31 (2) which lays down that compulsory acquisition of property can only be made for a public purpose. Clause (aa) was inserted between clause (a) and clause (b) of section 40 (1). Section 40 (1) as it stood before the amendment prohibited consent being given to acquisition of land by a company unless the acquisition was for one of the two reasons mentioned in clauses (a) and (b). Those two clauses clearly showed that acquisition for a company was for a public purpose and such acquisition could not be made for any purpose other than public purpose. Between the existing clause (a) and clause (b) of section 40 (1), we find clause (aa) being inserted. We also find that clause (aa) specifically uses the words "public purpose" and indicates that the company for which land is required should be engaged or about to be engaged in some industry or work of a public purpose. It was only for such a company that land was to be acquired compulsorily and the acquisition was for the construction of some building or work for such a company, i.e., a company engaged or about to be engaged in some industry or work which is for a public purpose. In this setting it seems to us reasonable to hold that the intention of Parliament could only have been that land should be acquired for such building or work for a company as would subserve the public purpose of the company, it could not have been intended, considering the setting in which clause (aa) was introduced, that land could be acquired for a building or work which would not subserve the public purpose of the company. In the circumstances it seems to us clear that the literal construction of the clause based on

¹ (1963) 1 S.C.J. 33 (1963) 1 M.L.J. 23 (1963) 1 A.N.W.R. (S.G.) 23 (1962) Supp. 2 S.C.R. 149 A.I.R. 1962 S.C. 764
² A.I.R. 1963 S.C. 1128

rules of grammar is not the only construction of it and it is in our opinion legitimate to hold that the public purpose of the industry of the company, which is imperative under the clause, also attaches to the building or work for the construction of which land is to be acquired. Further acquisition is for the construction of some building or work for a company and the nature of that company is that it is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose. When therefore the building or work is for such a company it seems to us that it is reasonable to hold that the nature of the building or work to be constructed takes colour from the nature of the company for which it is to be constructed. We are therefore of opinion that the literal and mechanical construction for which the petitioner contends is neither the only nor the true construction of clause (aa) and that when clause (aa) provides for acquisition of land needed for construction of some building or work it implicitly intends that the building or work which is to be constructed must be such as to subserve the public purpose of the industry or work in which the company is engaged or is about to be engaged. In short, the words "building or work" used in clause (aa) take their colour from the adjectival clause which governs the company for which the building or work is being constructed and acquisition under this clause can only be made where the company is engaged or is taking steps to engage itself in any industry or work which is for a public purpose, and the building or work which the company is intending to construct is of the same nature, namely, that it is a building or work which is meant to subserve the public purpose of the industry or work for which it is being constructed. It is only in these cases where the company is engaged in an industry or work of that kind and where the building or work is also constructed for a purpose of that kind, which is a public purpose, that acquisition can be made under clause (aa). As we read the clause we are of opinion that the public purpose of the company for which acquisition is to be made cannot be divorced from the purpose of the building or work and it is not open for such a company to acquire land under clause (aa) for a building or work which will not subserve the public purpose of the company. We are therefore of opinion that in the setting in which clause (aa) appears and in the circumstances in which it came to be enacted, a literal and mechanical construction for which the petitioner contends is not the only construction of this clause and that there is another construction which in our opinion is a better construction, and which is that the public purpose of the company is also implicit in the purpose of the building or work which is to be constructed for the company and it is only for such work or building which subserves the public purpose of the company that acquisition under clause (aa) can be made. Thus there are two possible constructions of this clause, one a mere mechanical and literal construction based on rules of grammar and the other which emerges from the setting in which the clause appears and the circumstances in which it came to be enacted and also from the words used therein, namely, acquisition being for a company which has a public purpose behind it, and therefore the building or work which is to be constructed and for which land is required must also have the same public purpose behind it, that animates the company making the construction. We are therefore clearly of opinion that two constructions are possible of this clause of which the second construction which is other than literal is the better one. It is well settled that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction : (see *Kedar Nath Singh v. State of Bihar*)¹. We are therefore of opinion that clause (aa) does not permit acquisition of land for construction of some building or work for a company engaged or to be engaged in an industry or work, which is for a public purpose, unless the building or work for which the land is acquired also subserves the public purpose of the industry or work in which the company is engaged. This is in our opinion the better construction of clause (aa) taking into account the setting in which it appears and the circumstances in

1. (1962) Supp. 2 S.C.R. 769; (1963) 1 A.W.R. (S.C.) 40 : (1963) 1 M.L.J. (S.C.) 40 : (1963) M.L.J. (Cr.) 25 : (1963) 1 S.C.J. 18 : A.I.R. 1962 S.C. 955.

which it came to be enacted and the words used therein. If that is the true construction of clause (aa) it cannot be said to contravene Article 31 (3) for the public purpose required therein is present where land is required for the construction of a building or work which must subserve the public purpose of the industry or work in which a company is engaged or is about to be engaged. Nor can it be said that the provision is hit by Article 19 (1) (f), for it would in our opinion be a reasonable restriction on the right to hold property. We hold therefore that the clause so interpreted is not unconstitutional. We have already said that the amendments in section 41 are only consequential to the insertion of clause (aa) in section 40 (1) and would therefore be equally valid and constitutional.

We now come to the constitutionality of section 7 of the Amendment Act which is attacked on the ground that it contravenes Article 31 (2) and Article 14 of the Constitution. Let us therefore see what exactly section 7 validates and under what conditions. It first provides that the acquisition to be validated must have been made before 20th July, 1962. Secondly it provides where such acquisition is not for any of the purposes mentioned in clause (a) or clause (b) of section 40 (1) of the Act, it shall be deemed to be for the purpose mentioned in clause (aa) introduced by the Amendment Act. Thirdly it provides that every such acquisition shall be, and shall be deemed always to have been as valid as if the provisions of sections 40 and 41 of the Act, as amended by the Amendment Act, were in force at all material times when such acquisition was made or proceeding was held or order was made or agreement was entered into or action was taken. Lastly, it provides that such acquisition shall be valid notwithstanding any judgment, decree or order of any Court. Therefore before section 7 can validate an acquisition made before 20th July, 1962, it must first be shown that the acquisition is complete and the land acquired has vested in Government. This means that the land acquired has vested in Government either under section 16 or section 17 (1) of the Act. Thus section 7 of the Amendment Act validates such acquisitions in which property has vested absolutely in Government either under section 16 or section 17 (1). Secondly section 7 of the Amendment Act provides that where acquisition has been made for a company before 20th July, 1962 or purported to have been made under clause (a) or clause (b) of section 40 (1) and those clauses do not apply in view of the interpretation put thereon in *R L Arora's case*¹, it shall be deemed that the acquisition was for the purpose mentioned in clause (aa) as inserted in section 40 (1) of the Act by the Amendment Act. Thirdly section 7 of the Amendment Act provides that every such acquisition and any proceeding, order, agreement or action in connection with such acquisition shall be, and shall be deemed always to have been, as valid as if the provisions of sections 40 and 41 of the Act as amended by the Amendment Act were in force at all material times when any action was taken for such acquisition. Finally, this validity is given to such acquisitions and to all actions taken in connection therewith notwithstanding any judgment, decree or order of any Court.

This is what section 7 of the Amendment Act provides. The attack in it on the basis of Article 31 (2) is that it makes an irrebuttable presumption that the acquisition was for a public purpose, though it may not be actually so and therefore contravenes Article 31 (2) inasmuch as the result of this irrebuttable presumption is that acquisition which may not have been for a public purpose, is validated. We do not think that there is any force in this contention in view of the interpretation we have given to clause (aa) introduced in section 40 (1). The first fiction in section 7 is that it shall be presumed that acquisitions before 20th July, 1962, if they do not fall within clause (a) or clause (b) of section 40 (1) shall be deemed to fall within clause (aa). That means that building or work for which acquisition was made was required for a public purpose of the kind indicated in clause (aa).

It does not however follow from this that if the purpose was not of the kind indicated in clause (aa) it will still be presumed that the acquisition was for the purpose mentioned in clause (aa). All that the first deeming provision lays down is that where the public purpose does not come within clause (a) or clause (b) it should be deemed to come within clause (aa), provided it is of a kind which can come within this clause. The intention behind this deeming provision clearly is to make the purpose of an acquisition made before 20th July, 1962 which does not fall within clause (a) or clause (b) of section 40 (1) to be judged in accordance with the provisions contained in clause (aa). On a reasonable interpretation, this deeming provision therefore only provides that where the purpose does not fall within clauses (a) and (b), it shall be deemed to fall under clause (aa) and to be judged in accordance therewith. If in fact the purpose of any acquisition made before 20th July, 1962, is such as does not fall within clause (aa), the deeming provision would be of no avail. Thus the first of the two fictions introduced by section 7 of the Amendment Act merely lays down that where a notification under section 6 of the Act cannot be justified under clause (a) and clause (b) of section 40 (1), it will be judged in accordance with the provision contained in clause (aa) and if it satisfies those provisions, the acquisition will be deemed for the purpose of that clause, as if that clause existed at the relevant time, though in actual fact it did not. The first fiction therefore in our opinion goes no further than this and does not provide that even though the purpose of acquisition does not fall within clause (aa), it will still be deemed to be a public purpose. In this view of the matter, we are of opinion that the attack on section 7 on the basis of Article 31 (2) must fail.

Next it is urged that section 7 of the Amendment Act is hit by Article 14 inasmuch as it discriminates between acquisition for a company before 20th July, 1962 and after that date. We do not think that there is any force in this contention either. In the view we have taken of the meaning of clause (aa) and the meaning of the first fiction introduced in section 7 of the Amendment Act, all that the second fiction in section 7 of the Amendment Act says is that when the first fiction is satisfied the second fiction will come into force and every such acquisition and any proceeding, order, agreement or action in connection with such acquisition shall be, and shall be deemed always to have been, as valid as if the provisions of sections 40 and 41 of the Act, as amended by the Amendment Act, were in force at all material times. In effect therefore section 7 provides that even though acquisitions made before 20th July, 1962 do not satisfy the conditions of clause (a) and clause (b) of section 40 (1), they will be valid if they satisfy the conditions of clause (aa) as introduced by the Amendment Act, as if that clause was in existence when the acquisition was made before 20th July, 1962. In this view we are of opinion that there is no discrimination in the matter of acquisition for a company before 20th July, 1962 and after that date because in either case the conditions of clause (aa) have to be actually satisfied whether the acquisition was before 20th July, 1962 or thereafter, as the validation by section 7 of the Amendment Act is only of such acquisitions before 20th July, 1962 which actually satisfy the provisions in clause (aa).

We may in this connection refer to the words "as valid as if" appearing in section 7 of the Amendment Act, because they are in our opinion the key words for the purpose of interpreting the extent of the validity conferred on acquisitions before 20th July, 1962. What the second fiction provides is that an acquisition made before that date shall be as valid as if the provisions of sections 40 and 41 of the Act as amended by the Amendment Act were in force at all material times. The force of the words "as valid as if" clearly is that the validity of acquisitions made before 20th July, 1962 has to be judged on the basis that clause (aa) was in force at the material time and in accordance therewith. The validity therefore is not absolute; it is conditioned by the fact that it will be as valid as if clause (aa) was in force; so that if it could not be valid even if clause (aa) was in force and could not be justified under the terms of that clause, the validity conferred by section 7 of the Amendment Act will not attach to it. This in our opinion is the force of the words "as valid as if" and the validity it has conferred is not absolute.

as contended on behalf of the petitioner and will not apply to those acquisitions which would not be valid if they could not be justified on the basis of clause (aa) assuming it to be in force at the material time. In this view the attack under Article 14 as well as Article 31 (2) fails, for in neither case can acquisition be valid whether made before 20th July, 1962 or thereafter, unless the conditions of clause (aa) are satisfied.

Next it is urged that even if section 7 is *intra vires*, it does not reopen decided cases and does not revive notifications and acquisitions actually struck down by Courts. We see no force in this contention. Section 7 opens with the words "notwithstanding any judgment, decree or order of any Court" and the validity conferred by it on acquisitions made before 20th July, 1962 is thus notwithstanding any judgment, decree or order of any Court. These are the usual words to be found in validating legislation where the intention is to validate some action which would otherwise be invalid and which may have been declared invalid by any Court. The purpose of such words in a validating legislation is to declare valid what has been held invalid by Courts and once the Legislature declares such action valid all steps taken in connection therewith are validated to the extent of validation. The result of the validation is that notifications or other steps taken which may otherwise have been invalid become valid. Further an acquisition also even though it may have been struck down by a Court would be validated if it has been made in the sense that property in the land to be acquired has vested in Government either under section 16 or section 17 (1) of the Act. It is not in dispute in this case that the property has vested in Government under section 17 (1) of the Act. It is also not in dispute that the purpose of the company was a public purpose, namely, manufacture of textile machinery parts and that the acquisition was also for the construction of works for that purpose. In the circumstances we fail to see how it can be said that the rights of the petitioner have not been affected at all by the validating provision in section 7 of the Act. The contention under this head also fails.

Then it is urged that the acquisition in the present case cannot be said to be for a public purpose inasmuch as the agreement between the company and the Government does not regulate or control the products of the company in the interest of the public. We have not been able to understand exactly what is meant by this. As we have already said, it is not in dispute that the purpose of the company is a public purpose, namely, production of textile machinery parts and the land is acquired for construction of works for that purpose. The agreement shows that the land is required for the construction of a work, namely, a factory for the manufacture of textile machinery and parts and that such work is likely to prove useful to the public. One term of the agreement is that the company, its successors and assignees will use the said land for the aforesaid purpose and for no other purpose without the previous sanction in writing of the State Government. Another term provides that if the said land or any part or parts thereof shall no longer be required by the company, then the company will forthwith relinquish and restore the same after removing all buildings and structures to the Governor at a price equal to the amount paid by it under the Act. It is clear therefore that the land cannot be used for any other purpose and it will have to be restored to the Government if it is not used for the purpose for which it was acquired. In this connection reference may be made to section 44 A introduced by the Amendment Act which lays down that

"No company for which any land is acquired under this Part shall be entitled to transfer the said land or any part thereof by sale mortgage, gift lease or otherwise except with the previous sanction of the appropriate Government."

This provision also provides a safeguard that the land will only be used for the public purpose for which it is acquired and not otherwise. The aforesaid terms in the agreement in our opinion satisfy the condition that the land will be used for the public purpose for which it was being acquired and for no other. Therefore the acquisition is for a public purpose as provided in clause (aa). We do not think it as the purpose of the Act that the agreement should provide for regulation or control

of the products of a company, which probably means that Government should control the quantum of production and distribution or the price of the produced articles. This in our opinion is foreign to the purpose of the Act. All that the Act requires is that before land is transferred to the company by the Government, the agreement should provide that land would be used for the purpose for which it was acquired and for no other. The Act has nothing to do with the control or regulation of the products of the company and gives no power to Government in that behalf. Nor do we think it was necessary in order that the public purpose mentioned in clause (aa) is carried out to have any further term in the agreement besides those which have been provided in the agreement in this case. The contention that the acquisition in the present case was not for a public purpose as the agreement does not provide for the control and regulation of the product of the company must therefore fail.

Lastly it is urged that the petitioner who was a business man was intending to use the land for erecting a factory. He could not do so because certain rules did not permit him to build a factory adjacent to the military installations which had been put up by the Defence Department on adjoining land. It is urged that it could not be the purpose of the Act that land which was intended to be used for one public purpose should be acquired for another public purpose. We see no force in this contention either. All that the Act requires is that the land should be required for a public purpose. The intention of the previous owner whatever it may be does not in our opinion enter into the question at all, so far as the validity of the acquisition is concerned provided the acquisition is for a public purpose. Whether the land should be acquired or not is a matter which may be urged under section 5-A of the Act, which gives the owner of the land the right to object to the acquisition, and it is for Government to decide whether the objection should be allowed or rejected. Once the Government decides that the objection should be rejected and that the acquisition is needed for a public purpose the validity of the notification under section 6 and the subsequent action thereafter cannot be challenged on the ground that the previous owner himself intended to use the land for some public purpose. In this connection our attention is invited to the observations of this Court in *Province of Bombay v. Kusaldas S. Advani*¹, where it was observed that :

"Under certain circumstances even securing a house for an individual may be in the interests of the community, but it cannot be to the general interest of the community to requisition the property of one refugee for the benefit of another refugee."

These observations in our opinion have no relevance to the matter under consideration. We are concerned here with acquisition for a public purpose, which is undisputed. This is not a case of a house of one person being requisitioned for another; this is a case of constructing some work which will be useful to the public and will subserve the public purpose of the production of textile machinery and its parts for the use of the general public. In these circumstances we are of opinion that there being a definite public purpose behind the acquisition in the present case, the acquisition would be justified under the Act irrespective of the intention of the previous owner of the land to use it for some other public purpose. The contention under this head must also fail.

It now remains only to consider the argument on behalf of the intervener that clause (aa) violates Article 14 inasmuch as it permits acquisition of land for a company but not for an individual or a private company, though the individual or the private company may also be engaged in or taking steps to engage himself or itself in an industry or work which is for a public purpose. Reference was also made to section 44-B, introduced by the Amendment Act, which lays down that "notwithstanding anything contained in this Act, no land shall be acquired under this Part except for the purpose mentioned in clause (a) of sub-section (1) of section 40, for a private company which is not a Government company."

It is said that there is discrimination between a public company and a Government company for which land can be acquired under clause (aa) on the one hand and a private company or an individual on the other. It is true that acquisition for the

purpose of clause (aa) can only be made for a Government company or a public company and cannot be made for a private company or an individual, but there is in our opinion a clear classification between a public company and a Government company on the one hand and a private company and an individual on the other, which has reasonable nexus with the objects to be achieved under the law. The intention of the Legislature clearly is that private individuals and private companies which really consist of a few private individuals banded together should not have the advantage of acquiring land even though they may be intending to engage in some industry or work which may be for a public purpose inasmuch as the enrichment consequent on such work goes to private individuals or to a group of them who have formed themselves into a private company. Public companies on the other hand are broad based and Government companies are really in a sense no different from Government, though for convenience of administration a Government company may be formed which thus becomes a separate legal entity. Thus in one case the acquisition results in private enrichment while in the other it is the public which gains in every way. Therefore a distinction in the matter of acquisition of land between public companies and Government companies on the one hand and private individuals and private companies on the other is in our opinion justified, considering the object behind clause (aa) as introduced into the Act. The contention under this head must therefore also fail.

The petition therefore fails and is hereby dismissed. In the circumstances we pass no order as to costs.

Rajagopala Ayyangar, J—I have had the advantage of perusing the judgment prepared by Wanchoo, J, but regret my inability to agree with it. In my opinion this writ petition has to be allowed.

The facts of the case and the relevant statutory provisions whose construction is involved in the petition, have been set out in full in the judgment just now pronounced and it is therefore unnecessary for me to recapitulate them. The principal points on which learned Counsel for the petitioner rested his case were mainly two: (1) that section 40 (1) (aa) introduced by section 3 of the Land Acquisition Amending Act (XXI of 1962) which I shall hereafter refer to as the Act, was unconstitutional, in that it authorised the compulsory acquisition of land for purposes which might not at all be public purposes and was therefore violative of Article 31 (2) of the Constitution, and (2) that section 7 of the Act by which acquisitions of land made prior to 20th July, 1962, for the purposes mentioned in section 40 (1) (aa) were purported to be validated did not on its proper construction cover the present case and further, even if it did that the said provision was invalid as *ultra vires* for the very same reason for which clause (aa) was.

I shall first take up the submission made to us by Mr. Agarwal about the amendment effected to section 40 (1) by the introduction of the new clause (aa). That clause reads

that such acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose.

so that after the amendment land may be compulsorily acquired by the State for a company for being utilised for the purpose above set out. It was not disputed by Mr. Setalvad who, appearing for the first and 3rd respondents, addressed to us the main arguments on behalf of the respondent, nor by the learned Attorney General appearing for the Union of India that if on a proper construction of clause (aa) power was reserved to compulsorily acquire land for a purpose other than a public purpose, the same would infringe Article 31 (2) of the Constitution and would, therefore, be void. The scope of the inquiry in the petition is therefore narrowed down and it would be sufficient to consider merely the construction of this clause and ascertain whether the purpose for which authority is conferred by it for making an acquisition, is a public purpose.

The clause starts with the words that the acquisition is needed for the construction of a building or work. It goes without saying that if the power to acquire here con-

ferred is related to the construction of a building or work, which is essential for starting an industry or for carrying on an industry which is necessary to be carried on in the public interest, the acquisition would be for a public purpose and undoubtedly the provision would be valid. The question is whether the words of the clause are capable of this construction. The words of the clause may be thus split up : (1) the land is needed for the construction of a "building" or "work"; and (2) that "building" or "work" is for a company which is engaged (omitting the immaterial words) in an industry or work which is for a public purpose. Therefore, if a company which is engaged in an industry which industry is invested with a public purpose *i.e.*, if the industry itself serves a public purpose, that the land is needed for the construction of a building or work for such a company is made sufficient to enable the acquisition to be made. In other words, the criterion of the justification for the acquisition is, that it is for a company of a designated nature, not that the land acquired is needed for a building or work which is essential for the carrying on of an industry which serves a public purpose. The company might be engaged in an industry which might be informed by a public purpose or whose products might be essential for the needs of the community, but under the clause as enacted it is not necessary that the land acquired is needed for being used for the purpose of that industry but may be needed for any purpose of the company; the only qualification being that the company answers the description set down in the clause. Thus, to take the present case the third respondent-company intends to start a factory for the manufacture of textile machinery. In the present state of the country's industrial development there could be no dispute that the industry in which the third respondent is engaged or would be engaged, would serve a national need and therefore a public purpose. But, as was put during the course of the argument, the land acquired might be needed not for the putting up of the factory premises or essential buildings connected with it for its operational needs, if one might use that expression, but say for a swimming pool or a tennis court in the compound of the Directors' residence for whom the company might consider it proper to provide accommodation. To take a more extreme case, the company's factory may be in city *A*, and if the company wants to provide a guest house, a holiday home or accommodation for its Directors at city *B*, the clause will enable the acquisition to be made for the purpose. It cannot be contended that the use of the land for such a purpose was invested with a public purpose so as to permit compulsory acquisition of land having regard to the terms of Article 31 (2).

The question, therefore, arises whether an acquisition for a purpose of this type is or is not permitted on clause (aa) as it now stands. I am clearly of the opinion that an acquisition for such a purpose would be covered, for the only two tests that are prescribed in it as conditions to be satisfied before an acquisition could be made under this clause are (1) that the land is needed for the construction of a building or work for a company *i.e.*, the acquisition of the land and the construction are *intra vires* of the memorandum of association of the company, and (2) that the company for which the acquisition is being made is one engaged or is to be engaged in an industry which is for a public purpose.

The first, and I would say the primary submission of Mr. Setalvad was that the words "for a public purpose" at the end of the clause ought to be read as governing and qualifying the words "building or work for a company" which occur earlier, so that under the clause not merely has the company to be one of the type described *i.e.*, engaging in an industry which serves a public purpose but such a company needs the land for the construction of a building or work which is essential for that industry to be commenced or carried on. I feel unable to accept this as a possible construction of the words used. For that construction to be adopted even the transposition of the words "for a public purpose" to an earlier point after the words "for a company" would not be sufficient assuming the rules of grammar permitted such a course; for, then it would leave out the description or categorisation of the company for which the land is needed, and in such a situation the entire object of the amendment would be frustrated, as it would not be a condition that the industry

in which the company is engaged is one which is required in public interest. Even if the clause were rewritten so as to introduce the words "for a public purpose" earlier and also retain them where it occurs now, the construction for which Mr. Setalvad contends cannot result, for then it would not make much sense, for the words "for a public purpose" if transposed earlier would not convey the meaning which Mr. Setalvad says they convey, because the construction which learned Counsel suggests is that the clause means that the land is needed for the construction of the factory and other essential buildings for a company engaged in an industry which serves the national interest. By no transposition of the words actually used in the clause can such a transformation be achieved.

The position as regards the construction of clause (aa) is not improved when one turns to the consequential amendment affected in section 41 of the Land Acquisition Act where a new clause (4) (a) has been introduced by section 4 of the Act. If in this provision at least which deals with the agreements which the Government is directed to enter into, it is clear that the acquisition could be made only for a public purpose and not for what one might term "the private purposes" of a company engaged in an industry which is essential for the public, then one could read clause (aa) together with this provision and use the terms of section 41 for construing the scope and purpose of section 40 (1) (aa). Clause (4) (a) reads

'Where the acquisition is for the construction of any building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which, and the conditions on which the building or work shall be constructed or executed and'

If anything, therefore, clause (4) (a) emphasizes that what Parliament considered essential was the nature of the company for whose benefit the acquisition was being made and not the nature of the use to which the property acquired may be put and that it would not matter if a company of the type described used the land acquired for the pleasure of its Directors or for its private purposes unrelated to the purpose of the industry in which it was engaged. Lastly, some attempt was made to show that the Rules framed under the Land Acquisition Act themselves threw light on the purpose for which the acquisition is to be made but it is, however, conceded that the Rules afforded no assistance either way on the matter.

It was then submitted that there is a presumption in favour of constitutionality and that the clause ought to be so read, if that were possible so as to sustain its validity. I quite agree that if the language were flexible in the sense that it could be read so as to make it refer only to cases of acquisition for a public purpose, this could and ought to be done. But this assumes that the clause is reasonably capable of two interpretations—one which would render it unconstitutional and the other which even though it be a little strained, would make it constitutional, then the Court would lean in favour of the latter construction.

The question therefore is whether the clause is capable of more than one interpretation. I would be stating only a truism if I said that there is no scope for interpretation here. With profound respect for my learned brethren, I consider that the words are capable only of one meaning. Rules of construction are merely aids to resolving ambiguity, if any exists. The first and primary rule, if those rules have to be invoked, is to take the words themselves and then arrive at their true meaning, for if they disclose an intelligible meaning then the process of interpretation stops, unless the words are reasonably capable of being understood in more than one way and rules of interpretation are then invoked to resolve that ambiguity. It was not suggested that the words do not, as they stand, make sense. They do, only the sense which they convey makes the clause unconstitutional. No doubt, the meaning of a word may vary with the setting or context, but that is not the position here. One asks in vain "which is the word which is said to bear a different meaning from the natural normal, dictionary sense, because of the context or setting?"

It was, however, urged that it could not have been the intention of Parliament to have intended the clause to mean what appears to be meaning which I have said the words bore. But this argument ignores the basic principle underlying all rules

of statutory construction that the intention of the Legislature has to be gathered only from the meaning of the words used, for they are the only means by which the intention of the law-maker could be gathered. It is only where there is an ambiguity and the words are capable of more than one construction that any extrinsic aid in the shape of the purpose of the Legislature, or the object of the legislation come in for consideration. "Where the language of an Act is clear and explicit," said Tindal, C.J. in *Warburton v. Loveland*¹, "we must give effect to it, whatever be the consequences, for in that case the words of the statute speak the intention of the Legislature". Authority is not needed for the proposition that the intention of the Legislature is not a matter to be speculated upon. Interpretation or construction cannot mean that a Court first reaches a conclusion as to what in its opinion the Legislature intended, even though this involves attributing a meaning divorced from the words used, and then adjust the meaning to the conclusion it has reached. As was observed by Lord Watson in an oft quoted passage in *Salomon v. A. Saloman & Co.*² :—

"Intention of the Legislature is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication."

It was the same principle that was explained by Lord Herschell in *Cox v. Hakes*³, when he said :

"..... It must be admitted that if the language of the Legislature interpreted according to the recognised canons of construction involves this result, your Lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature."

The only way in which I am able to read the clause is to relate the words "public purpose" to the nature of the industry carried on by the company and by no rule of construction with or without extrinsic aids or with reference to the context, not to speak of rules of grammar, can the reference to public purpose be related to the building or work for which the acquisition is permitted to be made.

The learned Attorney-General submitted that the provision could and ought to be read down and confined in its operation to acquisition for public purposes as properly understood; in other words, to sever the constitutional from the unconstitutional portions and uphold the former. I do not find it possible to adopt this approach in a clause worded like the one before us. On the construction of the clause which I hold is the only possible one to adopt, it means the State is empowered to compulsorily acquire land for companies which satisfy the description of being engaged in an industry which is essential for the life of the community whether or not the purpose for which the company proposes to use the land acquired is a public purpose. Where the purpose for which the acquisition could be made is indicated by the enactment and that purpose, is one which is primarily constitutionally permissible, but the words employed for indicating the purposes might possibly include some outside the power of the Legislature, an argument about reading down would require consideration. But in the clause now impugned, there is no purpose indicated at all, except that it is needed for a company which falls within a particular category. For such a situation I consider that there is no scope at all for invoking the principle of reading down.

Again, where the provision gives a *carte blanche* to Government to acquire land for any purpose it is not possible to sustain the validity of such a law and strike down merely the particular acquisition where land is acquired for a purpose which is not a public purpose, for here the vice is in the law itself and not merely in the application.

1. 2 D. and Cl. (H.L.) 480 at p. 489.

2. L.R. (1897) A.C. 22 at p. 38.

3. L.R. 15 A.C. 506 at p. 528.

I am, therefore, clearly of the opinion that clause (aa) introduced by the Amending Act XXXI of 1962 is unconstitutional as violative of Article 31 (2).

In this view it is unnecessary for me to consider the proper construction of section 7 of the Amending Act. Under the terms of section 7 of the Act, all acquisitions of land made prior to 20th June, 1962, even accepting the construction which Mr. Setalvad pressed upon us, are deemed to have been made for a purpose falling within clause (aa). If, as I have held, clause (aa) is unconstitutional and void, it was not contended that section 7 would be of any assistance to the respondents to sustain the acquisition of the petitioner's land. I would, therefore, allow the petition and grant the relief prayed for therein.

ORDER OF THE COURT:—In accordance with the opinion of the majority this petition fails and is dismissed. There will be no order as to costs.

K.S.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—P B GAJENDRAGADKAR, Chief Justice, A.K. SARKAR, K.N. WANCHOO, K. G. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ

The State of Uttar Pradesh

.. Appellant*

Kartar Singh

.. Respondent

Prevention of Food Adulteration Act (XXXVII of 1954)—Rules framed under—Rule 5 and Appendix B—Item 14 of A 11—Standard prescribed for ghee—Variation in Reichert value for different States—Validity of classification—Courts if can adopt the lowest value prescribed for some State and apply it for another State for which higher value is prescribed

In the absence of a pleading and proof of unreasonableness or arbitrariness or discriminatory nature of a rule (as for instance Item 14 of A-11 in Appendix B and Rule 5 of the Prevention of Food Adulteration Rules prescribing varying Reichert value for standard prescribed for ghee in different States, the Court cannot accept the statement of a party as to the unreasonableness or unconstitutionality of a rule and refuse to enforce the rule as it stands merely because in its view the standards are too high and for this reason the rule is unreasonable.

It is not open to the Court to adopt the lowest Reichert value prescribed for any area in the country as that which he would adopt for every other area in the country disregarding the Rules. The Court is not justified in practically legislating and laying down what the Rules should be rather than give effect to the law by adherence to the Rules as framed.

State v. Malik Ram, A.I R. 1962 All. 156 not approved

Appeal from the Judgment and Order dated 2nd May, 1962, of the Allahabad High Court in Criminal Revision No. 1579 of 1961.

O. P. Rana and C. P. Lal, Advocates, for Appellant.

Harnam Singh Chadda and Harbans Singh, Advocates, for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.:—This appeal which comes before us on a certificate of fitness granted by the High Court of Allahabad under Article 134(1)(c) of the Constitution, is against a judgment of that Court acquitting the respondent Kartar Singh of an offence under section 7 read with section 16 (1) (a) (i) of the Prevention of Food Adulteration Act, 1954 which may be conveniently referred to as the Act.

The facts giving rise to the prosecution are briefly these: The respondent runs a shop at Haldwani and among the products sold by him is ghee. On 19th March, 1960 a quantity of the ghee was purchased by the Food Inspector of the area and he put samples of the purchase into three phials which were sealed in the respondent's presence. It may be mentioned that even in the seizure memo the Food Inspector noted the ghee purchased by him as "pahadi ghee". One of the samples was forwarded to the Public Analyst to the Government of Uttar Pradesh for analysis

for ascertaining whether the said ghee was adulterated. The analysis disclosed that in several respects the sample was sub-standard and that in particular it had a Reichert value of 22.5 as against the prescribed minimum of 28 for ghee in Uttar Pradesh. After setting out the details of the analysis, the Public Analyst expressed the opinion that the sample "contained a small proportion of vegetable fat or oil foreign to pure ghee". On receipt of this report, the Medical Officer of Health, Haldwani, sanctioned the prosecution of the respondent and a complaint was thereafter laid before the Magistrate 1st Class by the Food Inspector. The respondent pleaded not guilty and entered on his defence. Subsequently, the second sample was got analysed by the Director, Central Food Laboratory, who reported that his analysis disclosed a Reichert value of 21.7 as against 22.5 of the Public Analyst. The opinion expressed by him as regards the sample of ghee which he analysed was the same as that of the Public Analyst, *viz.*, that the sample was adulterated.

The defence of the respondent who admitted that he had sold the ghee, samples of which were the subject of analysis, but denied it was adulterated, was two-fold: (1) He had obtained the ghee which he sold from Jodhpur. (2) The sample must be held not to be adulterated on the basis of the decision of the Allahabad High Court in *State v. Malik Ram*¹.

The plea by the respondent regarding the ghee sold having come from Jodhpur was made because if this were established under the Rules framed under the Act, to which we shall later refer, the minimum Reichert value prescribed for ghee in the Jodhpur area was 21 and that minimum requirement was satisfied by the sample analysed. The respondent led evidence to prove his purchase from Jodhpur but the learned Magistrate did not accept this case.

The other defence was a point of law relying on the decision of a Division Bench of the Allahabad High Court reported as *State v. Malik Ram*¹. The learned Judges who decided that case drew a distinction between ghee obtained from cattle in the hill districts of Uttar Pradesh and those from cattle in the plains. This decision was relied on by the respondent because the ghee sold by him was noted as 'pahadi-ghee' by the Food Inspector. The learned Judge held that notwithstanding the term of the rules to which we shall later refer, ghee obtained from hilly areas of Uttar Pradesh like Kumaon hills, could not be held to be adulterated if its Reichert value was equal to that prescribed for Himachal Pradesh which was mostly a hilly area. They therefore held that though the Rules under the Food Adulteration Act prescribed a minimum Reichert value of 28 for ghee for the entire State of Uttar Pradesh, still if ghee from hill areas of the Uttar Pradesh State reached a minimum of 26 Reichert value, such ghee would not be "adulterated ghee". We shall consider the correctness of this decision after completing the narrative of the proceedings. The learned Magistrate held that this decision did not affect the present case because the Reichert value of the respondent's ghee was less than 26. The Magistrate therefore convicted the respondent and sentenced him to rigorous imprisonment for a period of six months and a fine of Rs. 500, and in default to further imprisonment for three months.

The respondent preferred an appeal to the Sessions Judge, Kumaon, and raised the same pleas and defence as he put forward before the learned Magistrate. The Sessions Judge concurred in the finding of the Magistrate regarding the story of the respondent having bought the ghee from Jodhpur, and he also agreed with the Magistrate about the effect of the decision of the Division Bench of the High Court which was also relied on before him. The Sessions Judge, however, while upholding the conviction reduced the sentence of imprisonment from six months to one month and the fine to Rs. 200.

The respondent thereupon filed a Criminal Revision Petition to the High Court under sections 435 and 439 of the Criminal Procedure Code. The learned Judge

of the High Court agreed with the Court below on the finding of fact as regards the Jodhpur origin of the ghee observing "as the file stands I am satisfied that this ghee was of local origin". There was, of course, no point raised before him as regards the correctness of the analysis. The learned Judge, however, held that the basis on which the Reichert value had been prescribed for the several areas in the country was not based on any rational classification and he therefore held that it was sufficient if any vendor of ghee in the country satisfied the minimum standards prescribed for any area under these rules. As there were areas in the country in regard to which a minimum Reichert value of 21 had been prescribed, he held that the respondent was not guilty of adulteration and so directed his acquittal. It is from this decision that the present appeal has been filed by the State.

Before considering the point about the standards prescribed under the Food Adulteration Act being violative of Article 14, an Article which though not specifically mentioned, is apparently the ground upon which the learned Judge has held that the prescription of Reichert value of 28 for Uttar Pradesh was unenforceable, it would be necessary to set out the statutory provisions on which the decision of the present appeal turns. The Preamble to the Act describes it as one "to make provisions for the prevention of adulteration of food". Section 2 defines the word 'adulterated' as follows:

"An article of food shall be deemed to be adulterated—

(1) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability," to read only the portion that is material. Section 3 enables the Central Government to constitute a committee for food standards and it runs:

"3 (1) The Central Government shall, as soon as may be after the commencement of this Act, constitute a Committee called the Central Committee for Food Standards to advise the Central Government and the State Governments on matters arising out of the administration of this Act and to carry out the other functions assigned to it under this Act.

(2) The Committee shall consist of the following members, namely—

- (a) the Director-General, Health Services, ex-officio, who shall be the Chairman,
- (b) The Director of the Central Food Laboratory, ex-officio,
- (c) two experts nominated by the Central Government,
- (d) one representative each of the Central Ministries of Food and Agriculture, Commerce and Industry, Railways and Defence nominated by the Central Government,
- (e) one representative each nominated by the Government of each State,
- (f) two representatives nominated by the Central Government to represent the Union territories,
- (g) two representatives of industry and commerce nominated by the Central Government,
- (h) one representative of the medical profession nominated by the Indian Council of Medical Research."

Section 7 which prohibits the manufacture and sale of adulterated food reads

"No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—

- (i) any adulterated food,

Section 8 makes provision for State Governments appointing Public Analysts and section 9 for the appointment of Food Inspectors. The next material provision is that contained in section 13 which deals with the reports of the analysis of food for the purpose of ascertaining whether they are adulterated or sub-standard, etc. Its first sub-section directs the Public Analyst to make a report and under sub-section (3) the certificate issued by the Director of the Central Food Laboratory under sub-section (2) is to supersede the report given by a Public Analyst under sub-section (1). Section 16 provides for the penalties for offences under the Act. Section 23 confers on the Central Government power to make Rules but these Rules have to be framed after consultation with the Committee established under section 3 and among the Rules which might be made are—

— Section 23 (1) (b)—defining the standards of quality for, and fixing the limits of variability permissible in respect of any article of food,

"23. (2) All Rules made by the Central Government under this Act shall as soon as possible after they are made, be laid before both Houses of Parliament."

Under the power conferred by section 23, the Prevention of Food Adulteration Rules, 1955, were promulgated.

Rule 5 which occurs in Part III of the Rules—headed “Definitions and Standards of quality”—specifies that “the standards of quality of the various articles of food specified in Appendix B to these Rules are as defined in that Appendix.” Ghee is one of the articles of food whose standards are prescribed in Appendix B; milk and milk-products being listed under head A-11. Ghee is dealt with in Item 14 of A-11 and the standard prescribed for it runs :

“Ghee means the pure clarified fat derived solely from milk or from curds or from cream to which, no colouring matter or preservative has been added. It shall conform to the following specifications—

In Punjab, Uttar Pradesh, Bhopal,.....Vindhya Pradesh, Bihar, West Bengal (except Bishnupur) and PEPSU (except Mahendragarh) :

- (a)
- (b) Reichert value: Not less than 28.
- (c)
- (d)

In Madras, Andhra, Travancore-Cochin, Hyderabad, Mysore, Orissa, Assam, Tripura, Manipur, Madhya Bharat, Bombay, Himachal Pradesh, Mahendragarh District of PEPSU, Madhya Pradesh, (except cotton tract areas) and Rajasthan (except Jodhpur) the specifications will be the same as above except that Reichert value shall be not less than 26.0.

In Saurashtra, Kutch, cotton tract areas of Madhya Pradesh, Jodhpur Division of Rajasthan and Bishnupur Sub-division of West Bengal the Reichert value shall not be less than 21 and the Butyro refractor-meter reading at 40°C shall be between 41.5 to 45.0. The limits for free fatty acids and moisture the same as for ghee in Punjab, PEPSU, etc., given above.

Explanation.—By cotton tract is meant the areas in Madhya Pradesh where cotton seed is extensively fed to the cattle.

The learned Counsel for the State has urged before us that the learned Judge was not justified in striking down or re-drafting the Rules framed by the Central Government in the manner in which he has done, purporting to invoke Article 14 of the Constitution, and in virtually setting up what he considered was the reasonable standard of quality which should determine whether the ghee sold by the respondent was adulterated or not. We entirely agree with this submission. Now, it is common ground that if the Rules were valid and the standards prescribed enforceable, the ghee sold by the respondent was 'adulterated' with the result that the respondent was guilty of an offence under section 7 read with section 16 of the Act. The only question is whether there was any material placed before the Court for refusing to apply the Rules for determining the standards of quality.

The standards themselves, it would be noticed, have been prescribed by the Central Government on the advice of a Committee which included in its composition persons considered experts in the field of food technology and food analysis. In the circumstances, if the rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any a priori reasoning but only as a result of materials placed before the Court by way of scientific analysis. It is obvious that this can be done only when the party invoking the protection of Article 14 makes averments with details to sustain such a plea and leads evidence to establish his allegations. That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the Rules offend Article 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration. If, therefore, the respondent desired to challenge the validity of the rule on the ground either of its unreasonableness or its discriminatory nature, he had to lay a foundation for it by setting out the facts necessary to sustain such a plea and adduce cogent and convincing evidence to make out his case, for there is a presumption that every factor which is relevant or material has been taken into

account in formulating the classification of the zones and the prescription of the minimum standards to each zone, and where we have a rule framed with the assistance of a committee containing experts such as the one constituted under section 3 of the Act, that presumption is strong, if not overwhelming. We might in this connection add that the respondent cannot assert any fundamental right under Article 19 (1) to carry on business in adulterated foodstuffs.

Where the necessary facts have been pleaded and established, the Court would have materials before it on which it could base findings, as regards the reasonableness or otherwise or of the discriminatory nature of the Rules. In the absence of a pleading and proof of unreasonableness or arbitrariness the Court cannot accept the statement of a party as to the unreasonableness or unconstitutionality of a rule and refuse to enforce the rule as it stands merely because in its view the standards are too high and for this reason the rule is unreasonable. In the case before us there was neither pleading nor proof of any facts directed to that end. The only basis on which the contention regarding unreasonableness or discrimination was raised was an a priori argument addressed to the Court, that the division into the zones was not rational in that hilly and plain areas of the country were not differentiated for the prescription of the minimum Reichert values. That a distinction should exist between hilly regions and plains was again based on a priori reasoning resting on the different minimum Reichert values prescribed for Himachal Pradesh and Uttar Pradesh and on no other. It was however, not as if the entire State of Himachal Pradesh is of uniform elevation or even if no part of that State is plain country but yet if the same minimum was prescribed for the entire area of Himachal Pradesh, that would clearly show that the elevation of a place is not the only factor to be taken into account.

At this stage it might be pointed out that the test for Reichert or Reichert Meissl value of ghee is one of the important tests for detecting adulteration with certain vegetable oils by determining the proportion of the volatile soluble acids in the ghee. The presence of the adulterant disturbs the ratio existing in normal butter fat or ghee between soluble and insoluble acids and volatile and non volatile acids. The Reichert value of pure ghee is not constant, but is dependent on several factors—among them the breed of the cattle to be found in an area, whether the cattle are pasture fed or stall fed and the nature of the additional feed given, the nature of the terrain, the rainfall and climatic condition, etc. That the feed available for the cattle is a very material and determining factor is apparent even from the Rules, for a distinction is drawn between different areas of Madhya Pradesh depending on cotton seed being available for feeding the cattle. It is on the basis of the conjoint effects of these and other factors which obtain in the different areas, some pointing to a higher Reichert value and others neutralising it and after extensive surveys conducted from samples collected and analysed during various seasons that the country has been divided into zones under the Rules in Appendix 'B' and the minimum Reichert value ascertained and prescribed for each. From the fact that certain areas included in some of the zones are hilly, it does not automatically follow that that was the potent factor or the only factor which was taken into consideration for prescribing the standard for that region. Without appreciating the several factors which bear upon the Reichert value of the ghee produced in a locality and the value attributed to each of these several relevant factors it would not be possible to pronounce upon the reasonableness or correctness of the classification of the areas and the prescription of different standards to each of them.

In *State v. Malik Ram*¹ a Division Bench of the High Court held that because certain areas of Uttar Pradesh were hilly, the Reichert value prescribed for the hilly areas like those in Himachal Pradesh should be adopted and be given effect to notwithstanding there was no ambiguity in the Rules as regards the area where the prescribed standards should be applicable. Except a principle which the Court deduced from the Rules themselves there was no material before the Court

that the minimum standard prescribed for Uttar Pradesh was defective in any respect. The approach adopted by the learned Judges in *Malik Ram's case*¹, appears to us to be a reversal of the well-recognised principle that it is for those who challenge the constitutionality of a statute or a statutory rule to allege and prove the grounds of invalidity and the adoption of the contrary rule that when a party makes such a challenge it is for those who seek to support it to sustain it by positive evidence of its reasonableness and legality. The Court evolved from a reading of the Rules a principle that the standards vary with the elevation of the place, without having before it any materials for such a conclusion save what it considered was the rationale underlying the division into zones. As already explained, even in Himachal Pradesh the elevation of every place is not the same and there are areas which are higher than others and so the test adopted does not even satisfy logic. We do not consider that the Court was justified in practically legislating and laying down what the Rules should be rather than give effect to the law by adherence to the Rules as framed.

In the case now under appeal the learned Judge took the matter a step further and he adopted the lowest Reichart value prescribed for any area in the country as that which he would adopt for every other area in the country disregarding the Rules. We find no justification for this either and, in fact, if the learned Judges in *Malik Ram's case*¹, were in error in applying the Himachal standard to Hilly areas of Uttar Pradesh, the judgment now under appeal discloses even more error. We might add that if one could legitimately discard the standard prescribed in the Rules, as the learned Judge has done, we do not see any principle in holding, as he seems to indicate, that where the Reichart value is below 21 the ghee should be treated as adulterated. We, therefore, hold that the learned Judge was not justified in allowing the Revision of the respondent and acquitting him.

The result is that the appeal is allowed, the acquittal of the respondent is set aside and his conviction restored.

It was stated to us on behalf of the respondent that of the imprisonment for one month to which the sentence passed on him by the Magistrate was modified by the Sessions Judge, he had already undergone a sentence of 18 days. He has been on bail practically since the admission of his Revision Petition in the High Court. In the circumstances, we consider that the sentence of imprisonment passed on him might be reduced to the period already undergone. The sentence of fine imposed will however, stand.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—K. SUBBA RAO AND J.R. MUDHOLKAR, JJ.

K.J. Nathan

Appellant*

v.

S.V. Maruthi Rao and others

Respondents.

Transfer of Property Act (IV of 1882), section 58 (f)—Mortgage by deposit of title deeds—Requisites—Constructive delivery of documents of title—Sufficiency to create mortgage.

Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages where under there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are (i) debt; (ii) deposit of title deed; and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral and documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such

presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But the Court may presume under section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives or is inconsistent with the intention to create a mortgage by deposit of title deeds to be in force till the mortgage was executed.

Physical delivery of documents by the debtor to the creditor, is not the only mode of deposit. There may be a constructive deposit. A Court will have to ascertain in each case whether in substance there is delivery of title deeds by the debtor to the creditor. If creditor was already in possession of the title deeds, it would be hyper-technical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor re-delivering them to the creditor. What would be necessary in those circumstances is to see whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction.

[On the facts of the instant case it was found that there was a valid mortgage by deposit of title deeds.]

Appeal from the Judgment and Decree dated 31st January, 1957 of the Madras High Court in Appeal No 969 of 1952.

R. Ramamurthi Aiyar, T.S. Rangarajan and R. Gopalakrishnan, Advocates, for Appellant.

V.S. Venkataraman, M.R. Krishna Pallai and M.S.K. Iyengar, Advocates, for Respondent No. 3.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal on a certificate issued by the High Court of Judicature at Madras is preferred against the judgment and decree of the said High Court modifying those of the Subordinate Judge, Tanjore, in a suit filed by the appellant to enforce a mortgage by deposit of title deeds.

The facts are as follows: The first defendant borrowed from the plaintiff from time to time on seven promissory notes. The plaintiff, alleging that the first defendant had created a mortgage by deposit of title deeds in his favour in respect of his half-share in the properties specified in B Schedule, instituted O S No. 45 of 1951 in the Court of the Subordinate Judge, Tanjore, for enforcing the said mortgage against the said properties. The suit was for recovery of a sum of Rs. 20,435-15-0, made up of principal amount of Rs. 16,500 and interest thereon. To that suit six persons were made defendants: defendant 1 was the mortgagor; defendant 2 was the subsequent purchaser of several of the items of the suit properties subject to plaintiff's mortgage; defendant 3 was the subsequent mortgagee; defendant 4 was the subsequent purchaser of one of the plaintiff-schedule properties; and defendants 5 and 6 were sister and brother of the 1st defendant. The plaintiff also alleged that in a partition effected between the 1st defendant and his brother properties described in the C Schedule annexed to the plaint were allotted to the 1st defendant. He, therefore, asked in the alternative that the C Schedule properties should be sold for the realization of the amount due to him from the 1st defendant.

As the only contesting party before us is the 3rd defendant (3rd respondent herein), it is not necessary to notice the defences raised by defendants other than the 3rd defendant. The 3rd defendant alleged that the 1st defendant had executed a security bond in his favour for a sum of Rs. 15,000 on 10th October, 1947 and that, being a *bona fide* purchaser for value, he had priority over the plaintiff's security, even if it were true. He put the plaintiff to strict proof of the fact that the sum claimed in the plaint under several promissory notes was owing to him and also of the fact that the 1st defendant effected a mortgage of the suit properties by deposit of title deeds in favour of the plaintiff.

The learned Subordinate Judge held that the suit loans were true, that the mortgage by deposit of title deeds was also true, but the plaintiff had a valid mortgage only of items 1 and 4 of the C Schedule in respect of a sum of Rs. 9,157-5-0 with interest at 6 per cent. per annum thereon. On that finding, he gave a decree in favour of the plaintiff against defendants 1 to 3 for the said amount with a charge over items 1 and 4 of the C Schedule properties; and he also gave a decree

in favour of the plaintiff for a sum of Rs. 7,565-2-0 with further interest at 6 per cent. per annum from 5th July, 1947, against the 1st defendant personally. The plaintiff preferred an appeal against the decree of the Subordinate Judge; insofar as it went against him, and the 3rd defendant filed cross-objections in respect of that part of the decree which went against him. A Division Bench of the Madras High Court, which heard the appeal and the cross-objections, held that the 1st defendant did not effect a mortgage by deposit of title deeds on 10th May, 1947, in favour of the plaintiff for the entire suit claim, but that he effected such a mortgage in favour of the plaintiff on 25th January, 1947, for a sum of Rs. 3,000 in respect of two of the plaintiff-schedule items described in Exhibit A-8. On that finding, the High Court modified the judgment and decree of the Subordinate Judge by restricting the mortgage decree given to the plaintiff to the amounts covered by the first three promissory notes and interest thereon and to one half of the properties described in Exhibit A-8 and by giving a money decree against the 1st defendant for the entire balance of the decree amount. The plaintiff has preferred the present appeal against the decree of the High Court.

Learned Counsel for the appellant contends (1) that the finding of both the lower Courts that no mortgage by deposit of title deeds was effected for the entire plaintiff claim was vitiated by the fact that they had ignored Exhibit A-19, a registered agreement entered into between the plaintiff and the 1st defendant on 5th July, 1947, wherein the said fact was clearly and unambiguously recorded; and (2) that, even if such a mortgage was not effected on 10th May, 1947, Exhibit A-19 *proprio vigore* effected such a mortgage to come into effect at any rate from the date of the execution of the agreement.

Learned Counsel for the contesting 3rd respondent argues that the definite case of the plaintiff was that such a mortgage was effected only on 10th May, 1947, and that both the Courts below on a consideration of the oral and documentary evidence concurrently found that no such transaction was effected on that date and that, therefore, this Court should not interfere with such a finding of fact. He further contends that in Exhibit A-19 the parties only recorded that a mortgage by deposit of title deeds was effected on 10th May, 1959 and that, if that fact was not true, Exhibit A-19 could not be of any help to the plaintiff. If there was no mortgage on 10th May, 1947, the argument proceeds, Exhibit A-19 by its own force could not create a mortgage by deposit of title deeds on 5th July, 1947, as in terms it only referred to a mortgage alleged to have been effected on 10th May, 1947. That apart, it is argued that as a mortgage by deposit of title deeds could only be effected at Madras and that, as one of the important ingredients of such a mortgage is that the delivery of the said title deeds to the creditor should have been given at Madras, no such mortgage could have been effected in law in the present case, as the delivery of the title deeds was given by the bank to the representative of the plaintiff at Kumbakonam.

Before we advert to the arguments advanced in the case it would be convenient at this stage to notice the relevant aspects of the law pertaining to mortgage by deposit of title deeds.

Section 58 (f) of the Transfer of Property Act defines a mortgage by deposit of title deeds thus :

"Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay..... delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds."

Under this definition the essential requisites of a mortgage by deposit of title deeds are (i) debt, (ii) deposit of title deeds, and (iii) an intention that the deeds shall be security for the debt. Though such a mortgage is often described as an equitable mortgage, there is an essential distinction between an equitable mortgage as understood in English law and the mortgage by deposit of title deeds recognised under the Transfer of Property Act in India. In England an equitable mortgage can be created either (1) by actual deposit of title deeds, in which case parol evidence is

admissible to show the meaning of the deposit and the extent of the security created, or (2) if there be no deposit of title deeds, then by a memorandum in writing, purporting to create a security for money advanced - see *White and Tudor's Leading Cases in Equity*, 9th edition, Vol 2 at page 77. In either case it does not operate as an actual conveyance though it is enforceable in equity, whereas under the Transfer of Property Act a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee. This distinction will have to be borne in mind in appreciating the scope of the English decisions cited at the Bar. This distinction is also the basis for the view that for the purpose of priority it stood on the same footing as a mortgage by deed. Indeed a Proviso has been added to section 48 of the Registration Act by Amending Act XXI of 1929. It says

Provided that a mortgage by deposit of title deeds as defined in section 58 of the Transfer of Property Act 1882, shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property.

Therefore under the law of India a mortgage by deposit of title deeds, though it is limited to specific cities, is on a par with any other legal mortgage. The textbooks and the cases cited at the Bar give some valuable guides for ascertaining the intention of parties and also the nature of delivery of the documents of title requisite for constituting such a mortgage. Fisher in his book on "The Law of Mortgage", 2nd edition, page 32, suggests how the intention to create such a security could be established. He says

The intent to create such a security may be established by written documents alone or coupled with parol evidence, by parol evidence only that the deposit was made by way of security, or by the mere inference of an agreement drawn from the very fact of the deposit.

In *Norris v Wilkinson*¹, the Master of the Rolls in the context of that case where documents were delivered to the Attorney of the creditor for the purpose of enabling the Attorney to draw a mortgage which it was alleged that the debtor had agreed to give, made the following observations.

It is clear that these deeds if voluntarily delivered at all were not delivered by way of deposit, in the sense in which that word has been used in the cases, i.e. as a present and immediate security, but were delivered only for the purpose of enabling the Attorney to draw the mortgage, which it is alleged, Wilkinson the father had agreed to give.

The learned Master of the Rolls distinguished the cases cited before him thus

"Now in all the cases that have been referred to the deeds were delivered by way of deposit. Such deposit was indeed held to imply an obligation to execute a legal conveyance, whenever it should be required. But the primary intention was to execute an immediate pledge, with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose."

These passages indicate that an intention to create a mortgage deed in the future is not inconsistent with the intention to create in present a mortgage by deposit of title deeds. Both may co-exist. In *Keys v Williams*², it was held that an agreement to grant a mortgage for money already advanced and a deposit of deeds for the purpose of preparing a mortgage, was, in itself, an equitable mortgage by deposit. Though the facts of the case do not appear in the report, this decision indicates that the fact that deposit of title deeds was given for the purpose of preparing a mortgage does not in itself without more exclude the inference to create an equitable mortgage if the requisite conditions for creating thereof are satisfied. The decision in *Whitbread, Ex Parte*³, throws some light on the legal requirements of delivery of title deeds. There, the petitioner claimed a lien, as an equitable mortgage, by deposit in 1808 of the lease of a public house as a collateral security for £1000, lent to the lessee on his promissory note, and a subsequent advance of £100 made in January, 1810. One of the points mooted was whether the subsequent

1 (1806) 33 E.R. 73, 76

2 (1838) 51 Revised Reports, 339

3 (1812) 34 E.R. 496

advance of £100 was also charged on the property covered by the document. The learned Chancellor in that context made the following observations:

"If the original bargain did not look to future advances, no subsequent advance can be a charge, unless the subsequent transaction is equivalent to the original transaction. If it is equivalent to a re-delivery of the deed, receiving it back as a security for both sums, that will do; as it cannot depend upon that mere form: but I shall require them to swear expressly, that when the sum of £100 was advanced, it was upon the security of the deposit."

The said observations emphasize the substance of the transaction rather than the form. It implies that a debtor, who has already effected a mortgage by deposit of title-deeds in respect of an earlier advance, need not go through the formality of receiving back the said documents from the creditor and formally re-delivering them to the creditor as security for further advances taken by him. It would comply with the requirements of law if there was clear evidence that the documents already deposited with the creditor would also be charged by way of deposit of title-deeds in respect of the further advances. The doctrine accepted by this decision may, for convenience of reference, be described as the doctrine of constructive delivery. Learned Counsel for the respondent attempted to confine the scope of this decision to a case of further advances on the basis of documents already deposited with the creditor in respect of earlier advances. It is true that the principle was enunciated in the context of the said facts, but it is of wider application. In our view, the same principle will have to be invoked wherever documents of title have already been in the possession of creditor at the time when the debtor seeks to create a mortgage by deposit of title-deeds. In *In re Beetham, Ex. Parte Broderick*,¹ the facts were—A being indebted to a banking company in respect of an overdrawn account, wrote to the directors promising to give them, when required, security over his reversionary interest in one-fifth share of a farm, to come into possession on the death of the life tenant; but no formal security was ever executed in accordance with this promise. After the death of the life tenant the deeds of the farm came into the possession of A's brother, the manager of the bank, for the purpose of paying the succession duty. As regards A's share therein the brother claimed to hold them for the banking company with the consent of A as security for the overdrawn account. There was no memorandum of the deposit in the bank books, nor was the usual printed form of deposit of title-deeds by way of security made use of with reference to the transaction. A subsequently became bankrupt. The Queen's Bench held that the banking company had no valid equitable mortgage on the bankrupt's share in the farm and that it could not hold the rents as against his trustee in bankruptcy. On appeal, the Court of Appeal confirmed the said decision of the Queen's Bench. It is contended that this decision negatives the doctrine of constructive deposit, for it is said that though the manager of the bank with the consent of A held the title-deeds as security for the bank, the Court did not accept that fact for holding there was an equitable mortgage. In our view, this decision does not lay down any such proposition. The main reason for the aforesaid conclusion of the Court of Appeal is found in the judgment of Lord Esher, M.R. at pages 768-769 of the said report. After considering the facts of the case, the Master of the Rolls, proceeded to state:—

"If this be so, there was nothing but the oral promise of the bankrupt to give the bank security and that is not enough to satisfy the Statute of Frauds. In order to take the case out of the statute it must be shown that there has been performance or part performance of the oral promise. . . . But nothing more was done with the deeds; they were left in precisely the same position. Nothing was done, except that the one brother said something and the other said something in reply. Was this such a part performance of the original oral promise as will take the case out of the statute?"

His Lordship concluded:—

"I take that proposition to amount to this—That where there is a mere oral promise to do something, and nothing takes place afterwards but the speaking of mere words by the parties—when nothing more is done in fact—there is no part performance which can exclude the application of the Statute of Frauds."

The entire judgment was based upon the doctrine of part performance and the Court of Appeal held that the facts established did not constitute part performance of the oral agreement. The doctrine of constructive deposit was neither raised nor touched upon in that case.

Now let us consider some of the Indian decisions cited at the Bar. In *Dyal Jauraj v. Jauraj Ratansi*¹, the plaintiff had advanced to the 1st defendant Rs 38,000 and had agreed to advance Rs 27,000 more, the whole of Rs 65,000 to be secured by a mortgage of the 1st defendant's immovable property. The 1st defendant had deposited with the plaintiff the title-deeds of his immovable property, for the purpose of enabling him to get a mortgage deed prepared and had agreed to execute such mortgage deed on payment to him by the plaintiff the balance of the amount, of Rs 65,000. The title-deeds were afterwards returned by the plaintiff to the 1st defendant for the purpose of enabling him to clear up certain doubts as to his title to some of the premises comprised in the deeds, but the said deeds were neither subsequently returned by the 1st defendant, nor were others deposited in lieu thereof. The balance of the Rs 65,000 was not paid by the plaintiff to the 1st defendant. The Court held that there was an equitable mortgage of the said property to secure the sum of Rs 38,000. The fact that the title-deeds were deposited for the purpose of executing a mortgage deed, which did not fructify, did not in any way preclude the Court from holding on the facts of the case that a mortgage by deposit of title-deeds was created in respect of the amount that had already been paid to the debtor. The Court relied upon the principle enunciated by earlier English decisions based upon the fact whether amounts were lent before or after the deposit of title-deeds. In *Jaittha Bhama v. Haji Abdul Vyad Qasman*², the facts were these. The plaintiff consented to lend Rs 10,000 to the defendant. The latter deposited with him on 2nd April, 1883, the title-deeds of a certain property. On receiving them the plaintiff told the defendant that he would take them to his Attorney, have a deed drawn and then advance the money. The defendant applied to the plaintiff for the money before the deed was prepared, but the plaintiff refused, saying he would not advance the money until he was satisfied by his Attorney, and the deed had been prepared. At the time the deeds were handed over to the plaintiff there was no existing debt due by the defendant to the plaintiff. On 6th April, 1885 the mortgage deed was executed, and on the same day the money was advanced by the plaintiff to the defendant. The mortgage-deed was not registered. The plaintiff filed a suit for a declaration that he was entitled to an equitable mortgage upon the said property and for the sale thereof. The Court held that on the facts no equitable mortgage was created. From the aforesaid narration of facts it would be obvious that the plaintiff lent the money immediately before the execution of the document indicating thereby that it was paid under that document. Farran, J., who delivered the judgment, relied upon the following passage from Seton on Decrees page 1131:

If deeds be delivered to enable a legal mortgage for securing an existing debt to be prepared, there is an equitable mortgage until the legal mortgage is completed, *scilicet* if to secure a fresh loan yet to be made.

Then the learned Judge cited the following passage from the judgment in *Key v. Williams*³:

Certainly if before the money was advanced the deeds had been deposited with a view to prepare a future mortgage such a transaction could not be considered as an equitable mortgage by deposit but it is otherwise where there is a present advance and the deeds are deposited under a promise to forbear suing although they may be deposited only for the purpose of preparing a mortgage deed. In such case the deeds are given in as part of the security and become pledged from the very nature of the transaction.

These two passages also indicate that the fact that title-deeds were deposited for the purpose of preparing a future mortgage is in itself not decisive of the question whether such a mortgage was effected or not. A Division Bench of the Bombay

1 (1875) I.L.R. 1 Bom. 237

2 (1886) I.L.R. 10 Bom. 634

3 (1838) 51 Revised Reports 339

High Court in *Behram Bashid Irani v. Sorabji Rustumji Elavia*¹, held that in that case there was no evidence whatever of intention to connect the deposit of title-deeds with the debt. The plaintiff therein deposited with the defendant in Bombay title-deeds of his property situate at Nasik and borrowed a sum from the defendant. He also executed a document but that was held to be inadmissible for want of registration. There was no other evidence to show under what circumstances the documents were deposited. Beaman, J., made the following observations :

"The doctrine thus created, amounted at that time to very much what the law now is, as I have just expressed it, although the learned Chancellor, I think, lent strongly to the supposed legal presumption arising from the fact of indebtedness and the contemporaneous or subsequent deposit of title-deeds. Then for the better part of a century, the Courts in England virtually adopted this presumption as a presumption of law and the need of proving intention almost disappeared. Latterly, however, the legal doctrine in England veered in the opposite direction and the Courts began to insist more and more strongly upon the proof of intention as a question of fact, and that has been embodied in our own statute law and that is the law we have to administer."

This decision only negatives the presumption of law, but does not exclude the presumption of fact of a mortgage arising under certain circumstances from the very deposit of title-deeds. An elaborate discussion of the subject is found in *V.E.R.M. A.R. Chettyar Firm v. Ma Joo Teen*². The main question decided in that case was: what did the terms "documents of title" and "title-deeds" denote? The Court held that they denoted such a document or documents as show a *prima facie* or apparent title in the depositor to the property or to some interest therein. But what is relevant for the present purpose is that the learned Chief Justice, who spoke for the Court, after considering the leading judgments on the subject, observed :

"If the form of the documents of title that have been delivered to the creditor is such that from the deposit of such documents alone the Court would be entitled to conclude that the documents were deposited with the intention of creating a security for the repayment of the debt, *prima facie* a mortgage by deposit of title deeds would be proved ; although, of course, such an inference would not be irrebuttable, and would not be drawn if the weight of the evidence as a whole told against it."

The learned Chief Justice accepted the principle that if title-deeds, as defined by him were deposited and the money was lent, *prima facie* an inference of a mortgage could be drawn though, such an inference could be displaced by other evidence. It is not necessary to pursue the matter further.

The foregoing discussion may be summarized thus : Under the Transfer of Property Act a mortgage by deposit of title-deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are (i) debt; (ii) deposit of title-deed ; and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title-deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a Court may presume under section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title-deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title-deeds to be in force till the mortgage deed was executed. The decisions of English Courts, making a distinction between the debt preceding the deposit and that following it can at best be only a guide ; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor

1. (1914) I.L.R. 38 Bom. 372, 374.

2. (1933) I.L.R. 11 Rang. 239, 253.

to the creditor is not the only mode of deposit. There may be a constructive deposit. A Court will have to ascertain in each case whether in substance there is a delivery of title-deeds by the debtor to the creditor. If the creditor was already in possession of the title-deeds it would be hyper technical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor re-delivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction.

With this background we shall now proceed to consider the questions that arise for consideration on the facts of the present case.

The first question is whether there was a mortgage by deposit of title-deeds of the B Schedule properties on 10th May, 1947. To put in other words, whether on that date there was a loan and whether the first defendant delivered to the appellant the documents of title of B Schedule properties with the intent to create a security thereon.

Learned Subordinate Judge and, on appeal, the High Court held on the evidence there was no such deposit of title-deeds with the requisite intention on 10th May 1947. Learned Counsel for the respondent pressed on us to follow the usual practice of this Court of not interfering with concurrent findings of fact. But the question whether on facts found a transaction is a mortgage by deposit of title-deeds is a mixed question of fact and law. That apart, both the Courts in coming to the conclusion which they did missed the importance of the impact of the terms of Exhibit A-19 on the question raised. We, therefore, propose to consider the evidence on the said question afresh, along with Exhibit A 19.

In para 5 of the plaint, after giving the particulars of the promissory notes executed by the first defendant in favour of the plaintiff, it is stated

'On 10th May, 1947 the first defendant deposited with the plaintiff at Madras other title deeds and papers relating to his half share in items specified in 'B' Schedule hereunder with intent to create a security over the same in respect of advances made and to be made by the plaintiff. The first defendant has further executed a memorandum of agreement dated 5th July 1947, in which the equitable mortgage thus created and the amount borrowed by him till then were acknowledged and he has undertaken to repay the said sum of Rs. 16,500 with interest at 6 per cent per annum and to obtain a return of the title deeds and documents deposited by him with the plaintiff. This memorandum of agreement has been duly registered and the same is herewith produced. The plaintiff prays that its contents may be read as part and parcel of this plaint.

There is, therefore, a clear averment in the plaint that an equitable mortgage was created on 10th May, 1947, and that was acknowledged by the agreement dated 5th July, 1947. The 1st defendant did not file any written-statement denying the said allegations. The 3rd defendant, the only contesting defendant, filed a written statement wherein he put the plaintiff to strict proof of the fact that the sums claimed in the plaint were due to him from the 1st defendant and of the fact that the first defendant effected a mortgage in his favour by deposit of title-deeds. Before we consider the oral evidence, we shall briefly notice the documentary evidence in the case.

Exhibit A 1 dated 25th January, 1947, Exhibit A-9 dated 13th February, 1947, Exhibit A 12 dated 2nd March, 1947, Exhibit A 14, dated 7th April, 1947, Exhibit A 15 dated 13th April, 1947, Exhibit A 17 dated 10th May, 1947 and Exhibit A 18 dated 4th July, 1947, are the promissory notes executed by the 1st defendant in favour of the plaintiff. The total of the amounts covered by the said promissory notes is Rs. 16,500. It is not disputed that the promissory notes were genuine and that the said amounts were lent by the plaintiff to the 1st defendant on the dates the promissory notes bear. On 26th January, 1947, i.e., a day after the first promissory note was executed, a list of title-deeds of the properties belonging to the 1st defendant in Tanjore was given to the plaintiff as collateral security and by way of equitable mortgage for the loan of Rs. 1,500 borrowed under Exhibit A 1. On 7th April, 1947, the 1st defendant executed an unregistered agreement in favour of the plaintiff whereunder, as the plaintiff agreed to lend to the 1st defendant

a sum of Rs. 15,000 to discharge his earlier indebtedness and also his indebtedness to the Kumbakonam Bank and to enable him to do business, the 1st defendant agreed to execute a first mortgage of the Tanjore properties as well as of the properties mortgaged to the Kumbakonam Bank. He also undertook to bring all the title-deeds from the Kumbakonam Bank and hand them over to the plaintiff for preparing the mortgage deed. This agreement shows that the 1st defendant was willing to execute a mortgage deed of his properties to the plaintiff and with that object undertook to bring the title-deeds and hand them over to the plaintiff for preparing the mortgage deed. Pursuant to this agreement, the plaintiff on the same day advanced to the 1st defendant a sum of Rs. 3,000 under a promissory note of the same date. On 13th April, 1947, the plaintiff lent another sum of Rs. 3,000 under a promissory note to the 1st defendant. The 1st defendant did not bring the title-deeds, but by a letter dated 27th April, 1947 (Exhibit B-2) he authorized the Managing Director of the Kumbakonam Bank to hand over the title-deeds and the mortgage deed duly discharged to the plaintiff or his representative on his paying the amount due by him to the Bank. On 5th May, 1947, the plaintiff wrote a letter, Exhibit B-1, to the Kumbakonam Bank informing it that one S. Narayana Ayyar of Madras would discharge the mortgage amount due to the Bank from the 1st defendant and authorizing the Bank to deliver to the said Narayana Ayyar the cancelled mortgage deed and the relative title-deeds. The said Narayana Ayyar took the letter, Exhibit B-1, to the Bank, paid the amount due to it from the 1st defendant and took the title-deeds on behalf of the 1st defendant and sent them on to the plaintiff at Madras by registered post. On 10th May, 1947, the 1st defendant executed another promissory note, Exhibit A-17, for a sum of Rs. 7,100 in favour of the plaintiff in regard to the amount paid by Narayana Ayyar to the Bank. On 4th July, 1947, the 1st defendant executed another promissory note Exhibit A-18 in favour of the plaintiff for a sum of Rs. 400. The total of the amounts advanced up to that date by the plaintiff to the 1st defendant was Rs. 16,500. Exhibit A-19 dated 5th July, 1947, is a registered memorandum of agreement executed between the plaintiff and the 1st defendant. Though it was executed on 5th July, 1947, it was presented for registration on 31st October, 1947, and was eventually registered on 22nd June, 1948. It is not disputed that the said agreement was executed on 5th July, 1947. Under section 47 of the Registration Act the said document would have legal effect from the date of execution i.e., 5th July, 1947. Under that document the 1st defendant, after acknowledging that between 25th January, 1947, and 4th July, 1947, he had received from the plaintiff a sum of Rs. 16,500 under various promissory notes executed in favour of the plaintiff, proceeded to state:

"The borrower hereby acknowledges having deposited with the lender at Madras on 25th January, 1947 the title deeds relating to the borrower's undivided half-share in items 17 to 20 mentioned in the B Schedule hereunder and also having deposited with the lender on 10th May, 1947, the title-deeds and other papers relating to the borrower's undivided half-share in items 1 to 16 mentioned in B Schedule hereunder with intent to create a security over the deposit of title deeds."

This acknowledgment is couched in clear and unambiguous terms. The 1st defendant acknowledges in express terms that a mortgage by deposit of title-deeds was effected on 10th May, 1947. If there was no oral evidence adduced in this case, the said documentary evidence *prima facie* would establish that the 1st defendant borrowed a sum of Rs. 16,500 from time to time from the plaintiff and effected a mortgage by deposit of title-deeds on 10th May, 1947, as security for the repayment of the said amount. Exhibit A-19 contains a clear admission by the 1st defendant that he effected a mortgage by deposit of title-deeds in favour of the plaintiff. As the mortgage deed in favour of the 3rd defendant was executed subsequent to Exhibit A-19, he is bound by that admission, unless there is sufficient evidence on the record to explain away the said admission. The 1st defendant, who could explain the circumstances under which Exhibit A-19 was executed was not examined as a witness in this case. But it is said that the evidence of P.Ws. 1, 2 and 3 displaces the evidentiary value of the recitals of the said document. P.W. 1 is the plaintiff. He says in his examination-in-chief:

* On 10th May, 1947, defendant 1 and Narayana Ayyar met my lawyer at Madras and I was sent for Exhibit A 17 is the pro-note executed for Rs 7,100/ for the payment made to the bank. Defendant 1 then personally handed over the documents to me by way of deposit of title-deeds as security for the advance made and to be made. Defendant 1 did not execute any mortgage. In July 1947, defendant 1 asked for Rs 400 to buy stamps for the mortgage. I paid Rs 400 under Exhibit A 18. On 5th July 1947 the memorandum Exhibit A 19 was executed in my lawyer's house. My lawyer attested the document as well as Narayana Ayyar. They saw defendant 1 sign the document.

If this evidence is accepted, the plaintiff's case will be established to the hilt. But in the cross-examination he deposed

On 5th July 1947 the agreement about executing a simple mortgage was changed into one of equitable mortgage. Defendant 1 suggested it and I was advised to accept and I accepted."

Reliance is placed upon this statement to show that the idea of effecting an equitable mortgage dawned on the parties only on 5th July, 1947 and, therefore, the case that such a mortgage was effected on 10th May, 1947 must be untrue. We do not see any inconsistency between the statement made by the plaintiff in the examination-in-chief and that made in the cross-examination. What he stated in the cross-examination is that though it was agreed earlier that a formal mortgage deed should be executed on 5th July, 1947, the parties, for one reason or other, were content to have a deed of equitable mortgage. It is too much to expect this witness to bear in mind the subtle distinction between the execution of an equitable mortgage on 5th July, 1947, and the acknowledgment of an equitable mortgage that had already been effected. In his statement he emphasized more on the document than on the contents of the document. So understood this evidence does not run counter to the express recitals found in Exhibit A 19. There is also nothing unusual that on the advice of the Advocate the formalities of actual delivery were complied with in the presence of the Advocate. But one need not scrutinize the version of this witness meticulously in that regard, if in law a constructive delivery would be as good as a physical delivery. We, therefore, do not see in the evidence of P W 1 anything to discountenance the admission made by the 1st defendant in Exhibit A 19.

P W 2, the Advocate, also says in his evidence that he gave the title-deeds to the 1st defendant and asked him to hand them over to P W 1 and to state that these and documents already deposited would be security for the loans advanced till that date. There would be nothing unusual if an Advocate who knew the technicalities of a mortgage by deposit of title-deeds, advised his client to conform to the formalities. Even if the parties accepted constructive delivery, the evidence given by this witness is more an embellishment than a conscious effort to depart from the truth. As to what happened on 4th July, 1947, this witness says that on that date the 1st defendant and Narayana Ayyar came to him and suggested that the memorandum may be registered instead of executing a simple mortgage as either. If there was a mortgage by deposit of title-deeds at an earlier stage, even though there was at that time an agreement to execute a formal document later on, there would be nothing out of the way in the parties for their own reasons giving up the idea of executing a formal document and being satisfied with a memorandum acknowledging the earlier form of security. In the cross-examination this witness stated that till 4th July, 1947, the idea was only to make a simple mortgage over the half-share covered by all the title deeds given to P W 1. This statement only means that till that date the parties had no idea of executing a document acknowledging the earlier mortgage by deposit of title-deeds for they wanted a formal document. This answer is in no way inconsistent with the statement of the Advocate at the earlier stage that there was a mortgage by deposit of title-deeds on 10th May, 1947. So too, Narayana Ayyar, as P W 3 supports the evidence of P Ws 1 and 2. He too in his cross-examination says that it was only on 4th July, 1947, the idea of executing an equitable mortgage was suggested by the 1st defendant and that on 10th May, 1947, he did not suggest to the 1st defendant to execute any document. Here again, his statement in the cross-examination would not be inconsistent with that made by him in the examination-in-chief, if the former statement was under-

stood to relate to Exhibit A-19. This witness only meant to say that the idea of executing Exhibit A-19 dawned on the parties only on 4th July, 1947. The evidence of these three witnesses is consistent with the admission made by the first defendant in Exhibit A-19. The evidentiary value of the recitals in Exhibit A-19 is in no way displaced by the evidence of the said witnesses; indeed, it supports the recitals therein *in toto*. In the circumstances, we hold that on 10th May, 1947, the 1st defendant deposited the title-deeds with the plaintiff physically as security for the amounts advanced by the plaintiff to the 1st defendant up to that date. Even if the evidence of the witnesses as regards the handing-over of the documents physically by the 1st defendant to the plaintiff was an embellishment of what took place on that date and that there was only constructive delivery, we think that such delivery satisfied the condition laid down by section 58 (f) of the Transfer of Property Act.

Even so, it is contended by learned Counsel for the respondent that the delivery of the title-deeds was to the appellant's representative, Narayana Ayyar, at Kumbakonam and therefore, the mortgage by deposit of title-deeds, even if true, must be deemed to have been effected at Kumbakonam and that under the law such a mortgage could not be effected at Kumbakonam as it was not one of the places mentioned in section 58 (f) of the Transfer of Property Act. But Narayana Ayyar, as P.W. 3, stated in his evidence that he had authority to take the title-deeds on his behalf of the 1st defendant and that, after having taken delivery of them on his behalf, he sent them to the plaintiff at Madras by registered post. But whether Narayana Ayyar received the title-deeds from the Bank as agent of the 1st defendant or as that of the plaintiff, it would not affect the question to be decided in the present case. We shall assume that Narayana Ayyar was the agent of the plaintiff. But mere delivery of title-deeds without the intention to create a mortgage by deposit of title-deeds would not constitute such a mortgage. On 5th May, 1947, when the title-deeds were received by the plaintiff through his agent, Narayana Ayyar, at Kumbakonam, they were received only for the purpose of preparing the mortgage deed. The plaintiff had the physical possession of the title-deeds at Madras on 10th May, 1947. On that date the possession of the title-deeds by the plaintiff was as agent of the 1st defendant. He was not holding the said documents in his own right on the basis of his title or interest therein. The agent's possession was the possession of the 1st defendant, the principal. On 10th May, 1947, the creditor and the debtor, *i.e.*, the plaintiff and the 1st defendant, met in the house of P.W. 2 and the 1st defendant agreed to deposit the said title-deeds already in the physical possession of the plaintiff as his agent in order to hold them thereafter as security for the moneys advanced. From 10th May, 1947, the plaintiff ceased to hold the title-deeds as agent of the 1st defendant but held them only as a mortgagee. If the plaintiff physically handed over the title-deeds to the 1st defendant and the 1st defendant immediately handed over the same to the plaintiff with intention to mortgage them, it is conceded that a valid mortgage was created. To insist upon such a formality is to ignore the substance for the form. When the principal tells the agent "from today you hold my title-deeds as security", in substance there is a physical delivery. For convenience of reference such a delivery can be described as constructive delivery of title-deeds. The law recognizes such a constructive delivery. We, therefore, hold that, even on the assumption that the form of physical delivery had not been gone through—though we hold that it was so effected on 10th May, 1947—there was constructive delivery of the title-deeds coupled with the intention to create a mortgage by deposit of title-deeds.

The last argument of learned Counsel for the appellant is that even if there was no mortgage by deposit of title-deeds on 10th May, 1947, under Exhibit A-19 such a mortgage was created at any rate from 5th July, 1947. It is true that the document in express terms says that the documents of title were deposited on 10th May, 1947, with intention to create a mortgage by deposit of title-deeds. Assuming it was not so done on that date, can such an intention be inferred from the document as on 5th July, 1947? Admittedly on 5th July, 1947 the title deeds were in the

possession of the plaintiff. If on that date the 1st defendant had expressed his intention that from that date he would consider the title-deeds as security for the loans already advanced to him, all the necessary conditions of a mortgage by deposit of title-deeds would be present namely, (i) debts (ii) constructive delivery and (iii) intention. The fact that he had such an intention from an earlier date could not make any difference in law as the intention expressed was a continuing one. On 5th July 1947 according to the 1st defendant the mortgage by deposit of title-deeds was in existence and therefore on that date the said three necessary ingredients of a mortgage by deposit of title-deeds were present. We therefore, hold that even if there was no mortgage by deposit of title-deeds on 10th May, 1947, it was effected on 5th July 1947.

If the mortgage by deposit of title-deeds was effected on 10th May, 1947, or on 5th July, 1947 the legal position would be the same as the mortgage deed in favour of the 3rd defendant was executed only on 10th October, 1947. Though Exhibit A-19 was registered on 22nd June, 1948, under section 47 of the Registration Act the agreement would take effect from 5th July, 1947.

It is not disputed that in the partition that was effected between the 1st defendant and his brother the properties specified in 'C' Schedule were allotted to the share of the 1st defendant. If so the plaintiff would be entitled to have a mortgage decree in respect of the said properties. In the result there will be a preliminary decree in favour of the plaintiff for the recovery of the sum of Rs. 20,434-15-0 with interest at 6 per cent. per annum thereon till the said amount is paid. The period of redemption will be three months from today and in default the 'C' Schedule properties will be sold for the realization of the same. Liberty is reserved to the plaintiff to apply for personal decree against the 1st defendant in case there is any deficiency after the hypotheca has been sold. The decree of the Subordinate Judge and of the High Court are set aside and there will be a decree in the said terms. The 1st and 3rd defendants will pay the costs of the plaintiff throughout.

K. S.

Appeal allowed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P. B. GAJENDRAGADKAR, Chief Justice, K. N. WACHHO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ.

Raja Bra Kishore Deb, hereditary Superintendent, Jagannath Temple, P. O. and District Puri.

Appellant*

The State of Orissa

Respondent

Orissa Shri Jagannath Temple Act (II of 1950)—Constitutionality—Constitution of India (1950) Articles 14, 19 and 31—If infringed

A review of the provisions of Orissa Shri Jagannath Act (II of 1950) shows that broadly speaking the Act provides for the management of the secular affairs of the Temple and does not interfere with the religious affairs thereof which have to be performed according to the record of rights prepared under Orissa Puri Shri Jagannath Temple (Administration) Act (XIV of 1952) and where there is no such record of rights in accordance with custom and usage obtaining in the Temple.

The Temple stands in a class by itself in the State of Orissa and therefore requires special treatment. A law may be constitutional even though it relates to a single individual or temple. The Act cannot be struck down under Article 14 of the Constitution because the temple holds a unique position amongst Hindu temples in the State of Orissa and no other temple can be regarded as comparable with it.

If the secular management of the Temple was taken away from the sole control of the person hereditarily in management and vested in a committee of which he still remains the chairman, it cannot be said that the provisions contained in the Act for that purpose are hit either by Article 31 (2) or by Article 19 (1) (f). The right of superintendence is not property in the instant case for it carried no beneficial enjoyment of any property with it and that right has not been acquired by the State which Article 31 (2) requires.

Rights, privileges and prerequisites enjoyed by the manager as [adyasevaks were] not affected by the Act.

Clause (1) of section 15 imposes a duty on the committee to look after the secular part of the seva puja and leaves the religious part thereof entirely untouched. This does not interfere with the performance of religious duties themselves. The attack on this provision that it interferes with the religious affairs of the temple must therefore fail.

Appeal from the Judgment and Order dated 30th April, 1958, of the Orissa High Court in O.J.C. No. 321 of 1955.

M.C. Setalvad and Sarjoo Prasad, Senior Advocates (A.D. Mathur, Advocate, with them), for Appellant.

S.V. Gupte, Additional Solicitor-General of India (M.S.K. Sastri and R.N. Sachthy, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal on a certificate granted by the Orissa High Court raises the question of the constitutionality of the Shri Jagannath Temple Act, 1954, No. II of 1955 (hereinafter referred to as the Act). The challenge to the Act was made by the father of the present appellant by a writ petition filed in the High Court of Orissa. The appellant was substituted for his father on the death of the latter while the writ petition was pending in the High Court. The case put forward in the petition firstly was that the Shri Jagannath Temple (hereinafter referred to as the Temple) was the private property of the petitioner, Raja of Puri, and the Act, which deprived the appellant of his property was unconstitutional in view of Article 19 of the Constitution. In the alternative it was submitted that the appellant had the sole right of superintendence and management of the Temple and that that right could not be taken away without payment of compensation, and the Act inasmuch as it took away that right without any compensation was hit by Article 31 of the Constitution. It was further pleaded that the right of superintendence was property within the meaning of Article 19 (1) (f) and inasmuch as the appellant had been deprived of that property by the Act, it was an unreasonable provision which was not saved under Article 19 (5). The Act was further attacked on the ground that it was discriminatory and was therefore hit by Article 14 of the Constitution, as the Temple had been singled out for special legislation, though there was a general law in force with respect to Hindu religious endowments, namely, the Orissa Hindu Religious Endowments Act, No. II of 1952. Reliance was placed on Articles 26, 27 and 28 of the Constitution to invalidate the Act, though the appellant did not indicate in the petition how those Articles hit the Act. Lastly, it was urged that the utilisation of the Temple funds for purposes alien to the interest of the deity as proposed under the Act was illegal and *ultra vires*.

The petition was opposed on behalf of the State and it was urged that the Temple was not the private property of the appellant. The case of the State was that it was a public temple and the State always had the right to see that it was properly administered. Before the British conquered Orissa in 1803, the Temple had for a long time been managed by Muslim Rulers directly, though through Hindu employees. After 1803, the Temple began to be managed directly by the British Government, though by Regulation IV of 1802 the management was made over to the Raja of Khurda (who is now known as the Raja of Puri), who was appointed as hereditary superintendent in view of his family's connection in the past with the Temple. Even so, whenever there was mismanagement in the Temple during the course of the last century and a half, the Government always intervened and many a time administered the secular affairs of the Temple directly through one of its officers in whose favour the then Raja was made to execute a power of attorney divesting himself completely of all powers of management. The case of the State further was that in view of the reported mismanagement of the Temple, the State Legislature passed the Puri Shri Jagannath Temple (Administration) Act (XIV of 1952) for the appointment of a Special Officer for the preparation of a record pertaining to the rights and duties of different sevaks and pujaris and

such other persons connected with the seva, puja or management of the Temple and its endowments in order to put the administration of the Temple on a suitable basis. A Special Officer was accordingly appointed who submitted his report on 15th March 1954 which disclosed serious mismanagement of the affairs of the Temple and in consequence the Act was passed in 1955. The State contended that the Act was perfectly valid and constitutional and did not offend any constitutional provision.

When the matter came to be argued before the High Court, the appellant gave up the plea that the Temple was his private property and it was conceded that it was a public temple the properties of which were the properties of the deity and not the private properties of the Raja of Puri. In view of this concession, the attack on the constitutionality of the Act was based mainly on the ground that it took away the Raja's perquisites which had been found to belong to him in the record of rights prepared under the Act of 1952. It may be mentioned that the Raja of Puri had two fold connection with the Temple. In the first place, the Raja is the *adya sevak* i.e. the chief servant of the Temple and in that capacity he has certain rights and privileges. In addition to that, he was the sole superintendent of the Temple and was in charge of the management of the secular affairs of the Temple. The main contention of the appellant before the High Court was that the Act not only took away the management of the secular affairs of the Temple from the appellant but also interfered with his rights as *adya sevak* and was therefore unconstitutional. The High Court repelled all the submissions on behalf of the appellant and held that the Act was valid and constitutional except for one provision contained in section 28 (2) (f) thereof. The High Court therefore struck down that provision and upheld the constitutionality of the rest of the Act. Thereupon the appellant applied for a certificate which was granted, and that is how the appeal has come up before us.

Before we consider the attack on the constitutionality of the Act, we should like to indicate briefly what the scheme of the Act is and what it provides with respect to the management of the Temple. Section 1 provides for its commencement. Section 2 provides for certain repeals. Section 3 provides that the Orissa Act XIV of 1952 shall be deemed to be a part of the Act and delegates to the committee constituted under section 6 of the Act all powers of the State Government under the 1952 Act from such date as the State Government may notify. Section 4 is the definition section. Section 5 vests the administration and the governance of the Temple and its endowments in a committee called the Shri Jagannath Temple Managing Committee. The Committee shall be a body corporate, having perpetual succession and a common seal and may by the said name sue and be sued. Section 6 provides for the constitution of the committee with the Raja of Puri as its chairman. No person who does not profess the Hindu religion shall be eligible for membership. Besides providing for some *ex officio* members the other members of the committee are all nominated by the State Government, one from among the persons entitled to sit on the *mukhi-mandap* three from among the *sevak*s of the Temple recorded as such in the record of rights and seven from among those who do not belong to the above two classes. The Collector of the District of Puri is an *ex officio* member and is designated as the vice-chairman of the committee. Section 7 provides for the appointment of a chairman during the minority of the Raja of Puri or during the time when the Raja is suffering from any of the disabilities mentioned in section 10 (1), clauses (a) to (e) and (g) thereof. Section 8 lays down that nothing in section 7 shall be deemed to affect the rights and privileges of the Raja of Puri in respect of the Gajapati Maharaj Seva merely on the ground that the Raja has ceased to perform the duties of the chairman for the time being. Section 9 provides for the terms of office of members and section 10 gives power to the State Government to remove any member of the committee other than the *ex officio* members on the grounds specified in clauses (a) to (g) thereof. No member can be re-

moved from his membership unless he has been given a reasonable opportunity of showing cause against his removal. Section 11 provides for dissolution and supersession of the committee in certain contingencies, such as incompetence to perform the duties imposed upon it by the Act or making of default in performing such duties. The committee is given an opportunity to show cause against any such action before it is taken, and provision is made for continuing the management during the time the committee is superseded or has been dissolved. Section 12 provides for casual vacancies, section 13 for the meetings of the committee and section 14 for allowances to the members of the committee payable from the Temple fund; but no member of the committee other than the administrator is to be paid any salary or other remuneration from the Temple fund except such travelling and daily allowances as may be prescribed. Section 15 provides for the duties of the committee and it may be quoted in full as it is the main target of attack :

"Section : 15. Subject to the provisions of this Act and the Rules made thereunder, it shall be the duty of the Committee—

- (1) to arrange for the proper performance of sevapuja, and of the daily and periodical Nitis of the Temple in accordance with the Record-of-rights;
- (2) to provide facilities for the proper performance of worship by the pilgrims ;
- (3) to ensure the safe custody of the funds, valuable securities and jewelleryes and for the preservation and management of the properties vested in the Temple;
- (4) to ensure maintenance of order and discipline and proper hygienic conditions in the Temple and of proper standard of cleanliness and purity in the offerings made therein ;
- (5) to ensure that funds of the specific and religious endowments are spent according to the wishes, so far as may be known, of the donors ;
- (6) to make provision for the payment of suitable emoluments to its salaried staff ; and
- (7) to do all such things as may be incidental and conducive to the efficient management of the affairs of the Temple and its endowments and the convenience of the pilgrims."

Section 16 provides a ban on the alienation of Temple properties subject to certain conditions. Section 17 lays down that the committee shall have no power to borrow money from any person except with the previous sanction of the State Government. Section 18 provides for an annual administration report to be submitted to the Government. Section 18-A gives power to the committee with the prior approval of the State Government to delegate its functions to the Controller of the district or, as the case may be, to the officer who happens to be a member of the committee in place of such Collector. Section 19 gives power to the State Government to appoint an administrator for the Temple. Section 20 provides for the qualifications and conditions of service of the administrator and section 21 for the powers and duties of the administrator. As this section is specially attacked we quote it here in full.

"Section 21. (1) The Administrator shall be the Secretary of the Committee and its chief executive officer and shall subject to the control of the committee have powers to carry out its decision in accordance with the provisions of this Act.

(2) Notwithstanding anything in sub-section (1) or in section 5, the Administrator shall be responsible for the custody of all records and properties of the Temple, and shall arrange for proper collections of offerings made in the Temple and shall have power —

- (a) to appoint all officers and employees of the Temple ;
- (b) to lease out for a period not exceeding one year at a time the lands and buildings of the Temple which are ordinarily leased out ;
- (c) to call for tenders for works or supplies and accept such tenders when the amount or value thereof does not exceed two thousand rupees ;
- (d) to order for emergency repairs ;
- (e) to specify, by general or special orders, such conditions and safeguards as he deems fit, subject to which any sevak, office holder or servant shall have the right to be in possession of jewels or other valuable belongings of the temple ;

- (f) to decide disputes relating to the collection, distribution or apportionment of offerings, fees and other receipts in cash or in kind received from the members of the public,
- (g) to decide disputes relating to the rights, privileges, duties and obligations of sevaks office-holders and servants in respect of sevapuja and nitis, whether ordinary or special nature,
- (h) to require various sevaks and other persons to do their legitimate duties in time in accordance with the record-of rights, and
- (i) in the absence of any sevak or his substitutes or on the failure on the part of any such person to perform his duties, to get the niti or seva performed in accordance with the record-of rights by any other person

(3) The administrator may subject to such conditions, if any as the committee may by general or special order impose, afford facilities on payment of fees for special darshan or for any special service, ritual or ceremony, such darshan, service ritual or ceremony not being inconsistent with the custom and usage of the Temple and he shall have power to determine the portion, if any, of such fees which shall be paid to the sevaks office-holders or servants of the Temple.

Section 21-A provides that all sevaks office holders and servants attached to the Temple or in receipt of any emoluments or perquisites therefrom shall, whether such service is hereditary or not, be subject to the control of the administrator who may, subject to the provisions of the Act and the regulations made by the committee in that behalf, after giving the person concerned a reasonable opportunity of being heard withhold the receipt of emoluments or perquisites, impose a fine, suspend or dismiss any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of or wilful absence from duty, disorderly behaviour or conduct derogatory to the discipline or dignity of the temple or for any other sufficient cause.

Section 22 provides for extraordinary powers of the administrator who is directed to take action in emergency and report forthwith to the committee the action taken and the reasons therefor. Section 23 provides for the establishment schedule and section 24 provides for an appeal to the committee against an order of the administrator under section 21 (2) (f) or (g) or section 21-A. Sections 25 to 27 provide for the preparation of annual budget and audit. Section 28 provides for a Temple fund and how it is to be utilised. Section 29 bars suits against the State Government or against the committee of the administrator for anything done or purported to be done by any of them under the provisions of the Act. Section 30 gives power of general superintendence of the Temple and its endowments to the State Government which may pass any orders for the proper maintenance or administration of the Temple or its endowments or in the interest of the general public worshipping in the Temple. It also gives power to the State Government to examine the records of the administrator or of the committee in respect of any proceedings with a view to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order made therein, and if in any case it appears to the State Government that any such decision or order should be modified, annulled, reversed or remitted, for reconsideration, it may pass orders accordingly. The State Government is also given the power to stay the execution of any such decision or order in the meantime. Section 30 A creates an offence which is punishable on conviction with fine which may extend to Rs 500 whenever any person having to perform in respect of the nitis of the Temple or sevapuja of the deity raises any claim or dispute and fails or refuses to perform such duties, knowing or having reasons to believe that the non performance of the said duties would cause delay in the performance of the niti or sevapuja or inconvenience or harassment to the public or any section thereof entitled to worship in the Temple and wilfully disobeys or fails to comply with the orders of the administrator directing him to perform his duties without prejudice to the results of a proper adjudication of such claim or dispute. Section 31 gives power to the committee to frame regulations as to the conditions of service of office-bearers and employees of the Temple, procedure for transfer of sevapuja, chuli or panti in the Temple, observance of nitis and other usages in the Temple in the absence of specific mention in the record of rights, and any other matters for which regulations are required to be made for the purposes of the Act. Section 32 gives power to the State Government to frame Rules. Section 33 lays down that -

"the committee shall be entitled to take and be in possession of all movable and immovable properties, including the Ratna Bhandar and funds and jewellerys, records, documents and other assets belonging to the Temple."

and also lays down the procedure to be followed in case of resistance in obtaining such possession. Section 34 lays down that:—

"all public officers having custody of any record, register, report or other documents relating to the Temple or any movable or immovable property thereof shall furnish such copies of or extracts from the same as may be required by the administrator."

Section 35 lays down that:

"no act or proceeding of the committee or of any person acting as a member of the committee shall be deemed to be invalid by reason only of a defect in the establishment or constitution of the committee or on the ground that any member of the committee was not entitled to hold or continue in such office by reason of any disqualification or by reason of any irregularity or illegality in his appointment or by reason of such act having been done or proceeding taken during the period of any vacancy in the office of member of the committee."

Similar protection is given to an act or proceeding of the administrator. Section 36 provides for the removal of difficulties by the State Government so long as the order passed in that behalf is not inconsistent with the Act or the Rules made thereunder.

This review of the provisions of the Act shows that broadly speaking the Act provides for the management of the secular affairs of the Temple and does not interfere with the religious affairs thereof, which have to be performed according to the record of rights prepared under the Act of 1952 and where there is no such record of rights in accordance with custom and usage obtaining in the Temple. It is in this background that we have to consider the attack on the constitutionality of the Act. We may first dispose of the attack based on Article 14. It is urged that inasmuch as this special Act has been passed for this Temple and the general Act, namely, the Orissa Hindu Religious Endowments Act (II of 1952) no longer applies to this Temple, there has been discrimination inasmuch as the Temple has been singled out for special treatment as compared to other temples in the State of Orissa. There is no doubt that the Act is in many respects different from Act (II of 1952) and substitutes the committee for the Raja of Puri for the purpose of management of the Temple, and there would *prima facie* be discrimination unless it can be shown that the Temple stands in a class by itself and required special treatment. As to that, the affidavit on behalf of the State Government is that the Temple is a unique institution in the State of Orissa and is in a class by itself and that there is no comparison between the Temple and other temples in the State. The averment on behalf of the State is that the Temple has been treated as a special object throughout the centuries because of its unique importance and that there is no other temple which occupies the unique place which this Temple occupies in the whole of India. Also there is no other temple in Orissa with such vast assets or which attracts such a large number of pilgrims which pour into it from the whole of India. It is also averred that it is absolutely incorrect that there are other temples in Orissa which are equal to it from the standpoint of assets or from the standpoint of their all India character or from the standpoint of the complicated nature of *nitis* and *sevapuja* affecting the lives, religious susceptibilities and sentiments of millions of people spread all over India. There can be no doubt after this averment on behalf of the State that the Temple occupies a unique position in the State of Orissa and is a temple of national importance and no other temple in that State can compare with it. It stands in a class by itself and considering the fact that it attracts pilgrims from all over India in large numbers it must be a subject of special consideration by the State Government. In reply to these averments on behalf of the State, all that the appellant stated in his rejoinder was that these averments were not admitted. There was no denial of the special importance of the Temple as averred on behalf of the State and we have no doubt therefore that this Temple stands in a class by itself in the State of Orissa and therefore requires

special treatment We may in this connection refer to the decision of this Court in *Tilkayat Shri Govindlalji v State of Rajasthan*¹, where in relation to the temple at Nathdwara with respect to which a special Act had been passed by the State of Rajasthan, this Court observed that

"a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others that single individual may be treated as a class by himself"

The attack under Article 14 on the constitutionality of the law with respect to the temple at Nathdwara was repelled on the ground that the temple had a unique position amongst the Hindu shrines in the State of Rajasthan and no temple could be regarded as comparable with it. The same reason in our opinion apply to the Temple in the present case and the Act cannot be struck down under Article 14 because the Temple in the present case holds a unique position amongst the Hindu temples in the State of Orissa and no other temple can be regarded as comparable with it.

Next we come to the attack on the constitutionality of the Act on the ground that it has taken away the sole management of the temple which had so far been vested in the appellant or his ancestors. The reasons why the Act was passed are to be found in the Preamble thereof. The Preamble says that the ancient Temple of Lord Jagannath of Puri has ever since its inception been an institution of unique and national importance in which millions of Hindu devotees from regions far and wide have reposed their faith and belief and have regarded it as the epitome of their tradition and culture. It further says that long prior to and after the British conquest the superintendence, control and management of the affairs of the Temple have been the direct concern of successive rulers, governments and their officers and of the public exchequer. It then says that by Regulation IV of 1809 and thereafter by other laws and regulations in pursuance of arrangements entered into with the Raja of Khurda later designated as the Raja of Puri the said Raja came to be entrusted hereditarily with the management of the affairs of the Temple and its properties as superintendent subject to the control and supervision of the ruling power. It then goes on to say that in view of grave and serious irregularities thereafter the Government had to intervene on various occasions in the past. Finally the Preamble says that the administration under the superintendent has further deteriorated and a situation has arisen rendering it expedient to reorganise the scheme of management of the affairs of the Temple and its properties and provide better administration and governance therefore in supersession of all previous laws, regulations and arrangements, having regard to the ancient customs and usages and the unique and traditional rites and rituals contained in the record of rights prepared under the 1952 Act. So for all these reasons the appellant was removed from the sole superintendence of the Temple and a committee was appointed by section 6 of the Act for its management. These statements in the Preamble are not seriously in dispute as will be clear from the reports by G. Grome dated 10th June, 1905 and by the Special Officer appointed under the 1952 Act dated 15th March, 1954 and the correspondence which passed from time to time between the officers of the Government and the predecessors of the appellant. In these circumstances if the secular management of the Temple was taken away from the sole control of the appellant and vested in a committee of which he still remains the chairman, it cannot be said that the provisions contained in the Act for that purpose are hit either by Article 31 (2) or by Article 19 (1) (f). There is in our opinion a complete parallel between the provisions of the Act and the Act relating to the temple at Nathdwara in Rajasthan, which came up for consideration before this Court in *Tilkayat Govindlalji's case*¹. If anything, the case of the appellant is weaker than that of Shri Govindlalji, for the appellant in the present case was conferred with the power of superintendence by Regulation IV of 1809 after the British conquered Orissa. Whatever may have been his connection prior to 1809

with the Temple; the history of the Temple shows that the Muslim Rulers had removed him and were carrying on the management of the Temple directly through Hindu officers appointed by them. The right of management was conferred on the appellant's ancestor after the British conquest by virtue of the Regulation of 1809 and other laws passed thereafter. All that the Act has done is to replace his sole right of management by appointing a committee of which he is the chairman. Further there can be in the circumstances no question of the application of Article 31 (2) in the present case. In the first place, the right of superintendence is not property in this case for it carried no beneficial enjoyment of any property with it, and in the second place, that right has not been acquired by the State which Article 31 (2) requires. As was pointed out in *Tilkayat Govindlalji case*¹, all that has happened in the present case is that the sole right of the appellant to manage the property has been extinguished and in its place another body for the purpose of the administration of the property of the Temple has been created. In other words the office of one functionary is brought to an end and another functionary has come into existence in its place. Such a process cannot be said to constitute the acquisition of the extinguished office or the vesting of the rights in the person holding that office: (see *Tilkayat Govindlalji's case*)¹.

As we have already pointed out, the appellant and his predecessors always had two distinct rights with respect to this Temple. In the first place, they were the adya sevaks and as such had certain rights and privileges and perquisites. The rights as adya sevak as we shall show later have not been touched by the Act. The Act has only deprived him of the second right i.e., the sole management of the Temple which carried no beneficial enjoyment of any property with it and has conferred that management on a committee of which he still remains the chairman. In view of this clear dichotomy in the rights of the appellant and his predecessors there is no question of Article 31 (2) applying in the present case at all, insofar as this right of superintendence of the appellant is concerned. The attack on the constitutionality of the Act on the ground that the sole right of superintendence has been taken away from the appellant and that is hit by Article 19 (1) (f) or Article 31 (2) must therefore fail.

This brings us to the other aspect of the rights of the appellant as adya sevak, and it is urged that those rights have been taken away by the Act, and insofar as the Act has done that it is unconstitutional in that the provisions with respect to those rights are unreasonable and cannot be protected under Article 19 (5). Now we have already referred to the provisions of the Act, and if one looks at those provisions one finds nothing in them which takes away the rights of the appellant as adya sevak. If anything, there are indications in the Act to show that his rights, other than those of superintendence remain intact. When we say this we are not to be understood as saying that any rights which the appellant might have had in the capacity of adya sevak but which were of the nature of secular management of the Temple would still remain in him. Because the appellant and his predecessors were holding a dual position of superintendent and adya sevak, there was in the past a mixup of his rights flowing from being an adya sevak with his rights as a superintendent. But apart from the rights which vested in him as the sole manager of the Temple with respect to its management and which have only been taken away from him by the Act, we find nothing in the Act which takes away his rights as an adya sevak (i.e., the chief servant) of Lord Jagannath in the matter of seva-puja, nitis etc. These rights flow from his position as adya sevak, they are religious in character and are referable to his status and obligations as sevak. We may in this connection refer to section 8 of the Act which lays down that nothing in section 7 shall be deemed to affect the rights and privileges of the Raja in respect of Gajapati Maharaja Seva merely on the ground that the Raja has ceased to perform the duties of the chairman for the time being. This provision clearly shows that even though

the appellant may not be able to act as chairman of the committee because of his minority or because of certain disqualifications mentioned in section 7 read with section 10 (1), his rights and privileges in respect of the Gajapati Maharaja Seva (i.e. the daily sevapuja of Lord Jagannath) remain unaffected, and these were the rights which he had as adya sevak. Therefore section 8 preserves by the clearest implication the rights of the appellant as adya sevak in connection with the sevapuja of Lord Jagannath. In this connection our attention was drawn to section 14 of the Act which provides that it shall be within the power of the State Government by order to direct from time to time the payment from out of the Temple fund to the chairman of such allowances at times and in such manner as the State Government may consider reasonable and proper. It is said that in view of section 14 the appellant's rights and privileges as adya sevak have gone. We are of opinion that this is not so. As we have already said, the position of the superintendent and of adya sevak were two different positions which the appellant and his predecessors held in this Temple. His position as a superintendent has gone and in place of it he has become the chairman of the committee constituted under section 6. When section 14 speaks of allowances to him, it refers to his position as a chairman, which replaces his position as a superintendent before the Act. It has nothing to do with his position as an adya sevak which is safeguarded by section 8 of the Act inasmuch as rights and privileges in respect of the Gajapati Maharaja Seva are protected, even though he may cease to be the chairman on account of his minority or on account of some other reason. Therefore the provisions of section 14 refer to allowances only as a chairman and have nothing to do with the rights, privileges and perquisites as an adya sevak for he remains as adya sevak even though he may not for certain reasons remain a chairman. His rights, privileges and perquisites as adya sevak will remain protected under section 8 even though he may not be entitled to anything under section 14 if he ceases to be the chairman in view of section 7. No provision in the Act has been pointed out to us, which expressly takes away his rights, privileges and perquisites as adya sevak, on the other hand, there are other provisions which seem to indicate that even the rights and privileges of sevaks have not been affected by the Act. If so it is hardly likely in the absence of any specific provision that the Act would affect the privileges of the appellant as adya sevak. For example section 21 (2) (g) gives power to the administrator to decide disputes relating to the rights, privileges, duties and obligations of sevaks, office holders and servants in respect of seva puja and nitis, whether ordinary or special in nature. This clearly postulates that the rights and privileges of sevaks remain intact, and if there is any dispute about them the administrator has to decide it. Again section 21 (2) (f) provides that the administrator shall have power to decide disputes relating to the collection, distribution or apportionment of offerings, fees and other receipts in cash or in kind received from the members of the public. This again postulates a right in some persons who could only be sevaks etc. to a share of the offerings, fees and other receipts, and if there is any dispute about its distribution or apportionment the administrator has been given the power to decide it. Reading these two clauses together, there can be no manner of doubt that the Act does not affect even the rights, privileges and perquisites of sevaks. If so in the absence of express provision it cannot possibly be argued that the Act affects rights, privileges and perquisites of adya sevak. As we have already indicated those rights, privileges and perquisites of adya sevak have also been safeguarded under section 8 of the Act. Then we may refer to section 21 (3) which provides that

* the administrator may subject to such conditions if any as the committee may by general or special order impose afford facilities on payment of fees for special darshan or for any special service ritual or ceremony such darshan service ritual or ceremony not being inconsistent with the custom and usage of the Temple and he shall have power to determine the portion if any of such fees which shall be paid to the sevaks office-holders or servants of the Temple

This again postulates that the rights, privileges and perquisites of the sevaks are not to be affected by the Act but have to be governed by the record of rights or as the case may be by the order of the committee. The argument that the Act is *ultra vires* because it takes away the rights,

privileges and perquisites of the appellant as *adya sevaks*, some of which may be property must therefore fail in view of the specific provision in section 8 and indications in other provisions of the Act to which we have referred.

Clause (1) of section 15 of the Act is however specially attacked as interfering with the religious affairs of the Temple. The rest of the provisions of that section deal so obviously with secular matters that they have not been challenged. This clause provides that it shall be the duty of the committee to arrange for the proper performance of *sevapuja* and of the daily and periodical *nitis* of the Temple in accordance with the record of rights. As we read this clause we see no invasion of the religious affairs of the Temple therein. All that it provides is that it shall be the duty of the committee to arrange for the proper performance of *sevapuja*, etc. of the Temple in accordance with the record of rights. *Sevapuja* etc. have always two aspects. One aspect is the provision of materials and so on for the purpose of the *sevapuja*. This is a secular function. The other aspect is that after materials etc. have been provided, the *sevaks* or other persons who may be entitled to do so, perform the *sevapuja* and other rites as required by the dictates of religion. Clause (1) of section 15 has nothing to do with the second aspect, which is the religious aspect of *sevapuja*; it deals with the secular aspect of the *sevapuja* and enjoins upon the committee the duty to provide for the proper performance of *sevapuja* and that is also in accordance with the record of rights. So that the committee cannot deny materials for *sevapuja* if the record of rights says that certain materials are necessary. We are clearly of the opinion that clause (1) imposes a duty on the committee to look after the secular part of the *sevapuja* and leaves the religious part thereof entirely untouched. Further under this clause it will be the duty of the committee to see that those who are to carry out the religious part of the duty do their duties properly. But this again is a secular function to see that *sevaks* and other servants carry out their duties properly; it does not interfere with the performance of religious duties themselves. The attack on this provision that it interferes with the religious affairs of the Temple must therefore fail.

We may now briefly refer to some other sections of the Act which were attacked. Apart from the main sections 5 and 6 by which the appellant was divested of the sole management, the first section so attacked is section 11, which deals with the dissolution and supersession of the committee. We have not been able to understand how this section can be attacked once it is held that sections 5 and 6, constituting the committee in place of the Raja, are valid, as we have held that they are, for they are the main provisions by which the management has been transferred from the sole control of the Raja to the control of the committee. The next section in this group is section 19. That section provides for the appointment of an administrator to carry on the day-to-day administration of the secular part of the affairs of the Temple. We cannot see how this provision is liable to attack once sections 5 and 6 are held good, for the committee must have some officer under it to carry on the day-to-day administration. The next provision that is attacked in this group is section 21, which deals with powers and duties of the administrator. Again we cannot see how this provision can be attacked once it is held that the appointment of the administrator under section 19 is good, for section 21 only delimits the powers and duties of the administrator, and all powers and duties therein specified are with respect to the secular affairs of the Temple, and have no direct impact on the religious affairs thereof. The next section in this group is section 21-A. That section is clearly concerned with the secular management of the Temple, for the disciplinary powers conferred thereby on the administrator are necessary in order to carry on the administration of the secular affairs of the Temple. The next section which is attacked is section 30, which gives over-all supervisory power to the State Government. We cannot see how the control which the State Government is authorised to exercise by section 30 over the committee can be attacked once the appointment of the committee is held to be good. The last section under

this group is section 30 A, which treats a criminal offence and makes sevaks etc-liable to a fine on conviction. We think it unnecessary for present purposes to consider the validity of this section. The matter can be decided if and when a case of prosecution under that section ever arises.

This brings us to the contention relating to Articles 26, 27 and 28 of the Constitution which were referred to in the petition. Articles 27 and 28 in our opinion have nothing to do with the matters dealt with under the Act. The main reliance has however been placed on Article 26 (d) which lays down that subject to public order, morality and health every religious denomination or any section thereof shall have the right to administer its property in accordance with law. In the first place besides saying in the petition that the Act was hit by Article 26 there was no indication anywhere therein as to which was the denomination which was concerned with the Temple and whose rights to administer the Temple have been taken away. As a matter of fact the petition was filed on the basis that the appellant was the owner of the Temple which was his private property. There was no claim put forward on behalf of any denomination in the petition. Under these circumstances we are of opinion that it is not open to the appellant to argue that the Act is bad as it is hit by Article 26 (d). The argument addressed before the High Court in this connection was that the worshippers of Lord Jagannath constitute a distinct religious denomination within the meaning of Article 26 and that they had a right to administer the Temple and its endowments in accordance with law and that such administration should be only through the Raja of Puri as superintendent of the Temple assisted by the innumerable sevaks attached thereto. But inasmuch as the Act has taken away their right of management from the religious denomination i.e. the worshippers of Lord Jagannath, and entrusted it to the nominees of the State Government, there had been a contravention of the fundamental rights guaranteed under clause (d) of Article 26. This argument was met on behalf of the State with the contention that the Temple did not pertain to any particular sect, cult or creed of Hindus but was a public temple above all sects, cults and creeds; therefore as the temple was not the temple of any particular denomination no question arose of the breach of clause (d) of Article 26. The foundation for all this argument which was urged before the High Court was not laid in the writ petition. In these circumstances we think it was unnecessary for the High Court to enter into this question on a writ petition of this kind. The High Court however went into the matter and repelled the argument on the ground that the Temple in the present case was meant for all Hindus, even if all Hindus were treated as a denomination for purposes of Article 26, the management still remains with Hindus, for the committee of management consists entirely of Hindus, even though a nominated committee. In view of the defective state of pleadings however we are not prepared to allow the argument under Article 26 (d) to be raised before us and must reject it on the sole ground that no such contention was properly raised in the High Court.

For these reasons we find there is no force in this appeal and it is hereby dismissed with costs.

K.S

Appeal dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—P.B. GAJENDRAGADKAR, *Chief Justice*, K.N. WANCHOO, J.C. SHAH, N. RAJAGOPALA AYYANGAR AND S.M. SIKRI, JJ.

Ben Gorm Nilgiri Plantations Co-Conoor (Nilgiris) etc., etc. . . . *Appellants**

v.

The Sales Tax Officer, Special Circle, Ernakulam etc., etc. . . . *Respondents.*

Constitution of India (1950), Article 286 (1) (b)—Auctions of tea chests held at Fort Cochin along with export quotas for same—If exempt from sales tax under Travancore, Cochin General Sales Tax Act, (X of 1125 M.E.).

Tea Act XIX of 1950 provides for control by the Union of the Tea Industry, including the control of cultivation of tea in, and of export of tea from, India. The assesses (Tea plantations) obtain export quotas and tea is sold by auction with the export rights to agents of foreign buyers. The auctioneers as agents of sellers knew that bids are offered by the buyers of tea for the purpose of export and also that the bidder is an agent or an intermediary of a foreign buyer. On the question whether the sale by auction was in the course of export within the meaning of Article 286 (1) of the Constitution,

Held by the majority (Gajendragadkar, C.J., Shah and Sikri, JJ.).—The Parliament has, under the Central Sales Tax Act (LXXIV of 1956) enacted by section 5 that “a sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontier of India”. A transaction of sale which occasions export or which is effected by a transfer of documents of title after the goods have crossed the customs frontier is therefore, exempt from sales tax levied under any State legislation. But intention to export and actual exportation are not sufficient to constitute a sale one in the course of export.

The transaction of sale in the present case did not occasion the export of the goods, even though the sellers knew that the buyers in offering the bids for chests of tea and the export quotas were acting on behalf of foreign principals, and that the buyers intended to export the goods. There was between the sale and the export no such bond as would justify the inference that the sale and the export formed parts of a single transaction or that the sale and export were integrally connected. The sellers were not concerned with the actual exportation of the goods, and the sales were intended to be complete without the export, and as such it cannot be said that the said sales occasioned the export. The sales were therefore for export and not in the course of export.

Per Wanchoo and Rajagopala Ayyangar, JJ.—On the facts it was part of the understanding between the seller and the buyer, inferable from all the circumstances attendant on the transaction that the buyer was bound to export. What is of significance is the real common intention of the parties to the transaction—whether they contemplated the goods purchased being sold locally, or whether they intended the goods sold being only exported and not whether there is such a term in the contract between the parties. The sales in the present case did occasion the export.

Appeals by Special Leave from the Judgment and Order dated 26th October, 1961 of the Kerala High Court in Writ Appeals Nos. 104 to 106, 107, 109, 112, 108, 113, 110, 114, 111, 115, 116, 119, 120, 123, 124 and 122 of 1961.

M.C. Setalvad, Senior Advocate (*J.B. Dadachanji, O.C. Mathur and Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him), for Appellants (In all the Appeals).

V.P. Gopalan Nambiar, Advocate-General for the State of Kerala (*V.A. Seyid Muhammed*, Advocate with him), for Respondents (In all the Appeals).

The Court delivered the following Judgments

Shah, J. (on behalf of the Majority)—The Sales Tax, Officer, Special Circle, Ernakulam assessed the appellants under the Travancore-Cochin General Sales Tax Act XI of 1125 M.E., to pay sales tax on transactions of sale of tea chests at the auctions held at Fort Cochin in the years 1956-57 to 1958-59, rejecting their contention that the sales were exempt from tax by virtue of Article 286 (1) (b) of the Constitution. The appellants then petitioned the High Court of Kerala for writs of *certiorari* quashing the orders of assessment and for writs of *prohibition* restraining the Sales Tax Officer from proceeding with the collection of tax in pursuance of the orders of assessment. *Vaidialingam J.*, rejected the petitions and his

order was confirmed in appeal by a Division Bench of the High Court of Kerala. With Special Leave, the appellants have appealed to this Court.

The transactions of sale sought to be taxed by the Revenue Authorities are in tea, which is a controlled commodity. The Parliament enacted the Tea Act XIX of 1953 to provide for the control by the Union of the Tea Industry, including the control of cultivation of tea in and of export of tea from India and for that purpose to establish a Tea Board and to levy customs duty on tea exported from India. By section 3 (f) "export" is defined as taking out of India by land, sea or air to any place outside India other than a country or territory notified in that behalf by the Central Government by notification in the Official Gazette. "Export allotment" is defined by section 3 (g) as the total quantity of tea which may be exported during any one financial year. Section 17 (1) places an embargo upon exportation of tea unless covered by a licence issued by or on behalf of the Board. Section 18 provides that no consignment of tea shall be shipped or water borne to be shipped for export or shall be exported until the owner has delivered to the Customs Collector a valid export licence or special export licence or a valid permit issued by or on behalf of the Board or the Central Government as the case may be, covering the quantity to be shipped. Section 19 authorises the Central Government to declare export allotments of tea for each financial year, and by section 20 it is provided that any tea estate shall subject to conditions as may be prescribed, have the right to receive under the Act an export quota for each financial year. Section 21 provides that the owner of a tea estate to which an export quota has been allotted for any financial year shall have the right to obtain at any time export licences during that year to cover the export of tea upto the amount of the unexhausted balance of the quota. The export quota right is by clause (2) of section 21 transferable subject to such conditions as may be prescribed and the transferee of such right may again transfer the whole or any part of his right provided that nothing in the sub-section shall operate to restrict the issue of licences for the export of tea expressed to be sold with export rights. The other provisions are not material in deciding this group of appeals.

Trade in tea in the State of Kerala—internal as well as export—is carried on through certain defined channels. A manufacturer of tea applies for and obtains from the Tea Board allotment of export quota rights on payment of the necessary licence fee. The manufactured tea in chest is then sent to M/s T. Stanes and Company Ltd, who warehouse the chest at Willingdon Island. Chests of tea are then sold by public auction through brokers at Fort Cochin. With the chests of tea for which export quota rights are obtained, export quota rights are sold by the auctioneer. At the auction sale, bids for tea chests with export quota rights are given by the agents or intermediaries in Cochin of foreign buyers. Tea chests are delivered at the warehouses by M/s T. Stanes and Company Ltd to the purchasers whose bids are accepted. The agents or intermediaries of the foreign buyers then obtain licences from the Central Government for export of the tea chests under the export quota rights vested in them under the purchases made at the auction sales.

Tea cannot therefore be exported otherwise than under a licence such a licence may be issued to a manufacturer or to the purchaser of the quota granted by the Central Government to the manufacturer when tea is sold with export rights. When auctions of tea with the export rights are held at Fort Cochin it is in this group of appeals common ground sellers on whose behalf the auctioneer acts as the agent know that bids are offered by the buyers of tea for the purpose of export. It is also known that the bidder is an agent or an intermediary of a foreign buyer.

Is the sale by auction to the agent or intermediary of the foreign buyer, in the course of export within the meaning of Article 286 (1) of the Constitution? If the sale is in the course of export out of the territory of India any State law which imposes or authorises the imposition of a tax on such sale is because of Article 286 (1) (b), invalid. Before the Constitution was amended by the Constitution (Sixth

Amendment) Act, 1956, there was no legislative guidance as to what were transactions of sale in the course of export out of the territory of India. But by the Constitution (Sixth Amendment) Act, clause (2) of Article 286 was substituted for the original clause, and thereby the Parliament was authorised to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1). The Parliament has under the Central Sales Tax Act (LXXIV of 1956) enacted by section 5 that

"a sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India."

This was legislative recognition of what was said by this Court in the *State of Travancore-Cochin and others v. The Bombay Company Ltd.*¹ and *State of Travancore-Cochin and others v. Shanmugha Vilas Cashew Nut Factory and others*², about the true connotation of the expression "in the course of the export of the goods out of the territory of India" in Article 286 (1) (b). A transaction of sale which occasions export or which is effected by a transfer of documents of title after the goods have crossed the customs frontiers, is therefore, exempt from sales tax levied under any State legislation.

The appellants set out in their respective petitions the manner in which sales of tea chests were conducted at Fort Cochin and in certain petitions affidavits in reply even were not filed by the State of Kerala. In the remaining petitions in which affidavits in reply were filed it was contended that the export of goods was made by the purchasers who had taken delivery of the goods from the manufacturers in Travancore-Cochin and in pursuance of the export licences obtained by the purchasers goods were exported, but such subsequent export by the purchasers did not affect the character of the sales by the manufacturers to the purchasers. It is true that there is no finding by the Sales Tax Authorities that the respective purchasers at the auctions were agents of foreign buyers, but the Advocate appearing on behalf of the State argued the case before the High Court on the footing that the bids were offered at the auctions by the agents or intermediaries of foreign buyers, and the Court proceeded to dispose of the case before it on that footing.

Vaidialingam, J., held that transactions of sale were complete when bids for purchase of tea together with the export quota rights were accepted, and the sellers had no concern with the actual export which was effected by the auction purchasers to their foreign principals. It could not, therefore, in the view of the learned Judge, be held that the sales in question had as an integral part thereof occasioned export; that is, the sales preceded the export and were not in the course of export. The High Court in appeal held that the ban imposed by Article 286 (1) (b) predicated a casual connection between the sale and the export—a connection which is intimate and real. The sale, it was said, must inextricably be bound up with the export and form an integral part thereof, so that without export the sale is not effectuated; but as the sale imposed or involved no obligation to export, there was no movement under the contract of sale, and exemption claimed was not admissible. Correctness of this view is challenged in this appeal.

To constitute a sale in the course of export of goods out of the territory of India, common intention of the parties to the transaction to export the goods followed by actual export of the goods, to a foreign destination is necessary. But intention to export and actual exportation are not sufficient to constitute a sale in the course of export, for a sale by export

"involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction." *State of Travancore-Cochin and others v. The Bombay Company, Ltd.*¹

A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot

1. (1952) S.C.J. 527 : (1953) 1 M.L.J. 1 :
(1952) S.C.R. 1112 : A.I.R. 1952 S.C. 366.

2. (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 :
(1954) S.C.R. 53 : A.I.R. 1953 S.C. 333.

be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale *for* export, but is not necessarily to be regarded as one *in the course of* export, unless the sale occasions export. And to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a transaction of sale cannot be called a sale in the course of export of goods out of the territory of India. There are a variety of transactions in which the sale of a commodity is followed by export thereof. At one end are transactions in which there is a sale of goods in India and the purchaser immediately or remote exports the goods out of India for foreign consumption. For instance, the foreign purchaser either by himself or through his agent purchases goods within the territory of India and exports the goods and even if the seller has the knowledge that the goods are intended by the purchaser to be exported such a transaction is not in the course of export for the seller does not export the goods, and it is not his concern as to how the purchaser deals with the goods. Such a transaction without more cannot be regarded as one in the course of export because etymologically 'in the course of export' contemplates an integral relation or bond between the sale and the export. At the other end is a transaction under a contract of sale with a foreign buyer under which the goods may under the contract be delivered by the seller to a common carrier for transporting them to the purchaser. Such a sale would indisputably be one for export, whether the contract and delivery to the common carrier are effected directly or through agents. But in between lie a variety of transactions in which the question whether the sale is one for export or is one in the course of export *i.e.*, it is a transaction which has occasioned the export, may have to be determined on a correct appraisal of all the facts. No single test can be laid as decisive for determining that question. Each case must depend upon its facts. But that is not to say that the distinction between transactions which may be called sales *for* export and sales *in the course of* export is not real. In general where the sale is effected by the seller, and he is not connected with the export which actually takes place, it is a sale *for* export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export.

It may be conceded that when chests of tea out of the export quota are sold together with the export rights, the goods are earmarked for export, and knowledge that the goods were purchased by the bidders for exporting them to the foreign principals of the bidders must clearly be attributable to them. Does the co-existence of these circumstances, impress upon the transactions of sale with the character of a transaction in the course of export out of the territory of India? We are unable to hold that it does. That the tea chests are sold together with export rights imputes knowledge to the seller that the goods are purchased with the intention of exporting. But there is nothing in the transaction from which springs a bond between the sale and the intended export linking them up as part of the same transaction. Knowledge that the goods purchased are intended to be exported does not make the sale and export parts of the same transaction, nor does the sale of the quota with the sale of the goods lead to that result. There is no statutory obligation upon the purchaser to export the chests-of-tea purchased-by-him-with-the-exports-rights. The export quota merely enables the purchaser to obtain export licence which he may or may not obtain. There is nothing in law or in the contract bet-

ween the parties, or even in the nature of the transaction which prohibits diversion of the goods for internal consumption. The sellers have no concern with the actual export of the goods, once the goods are sold. They have no control over the goods. There is therefore no direct connection between the sale and export of the goods which would make them parts of an integrated transaction of sale in the course of export.

Decided cases on which reliance was placed at the Bar have mainly been of cases in which the benefit of the exemption of Article 286 (1) (b) was claimed in respect of sales preceding the export sale. Such a sale preceding the export could not it was held, without doing violence to the language of Article 286 (1) (b) be given the benefit of the exemption from tax imposed by State legislation merely because of its historical connection with the export sale. In a majority of the cases to be presently referred there were at least two sales—sale under which goods were procured followed by a sale under which the goods so procured were exported and the claim of the Revenue to tax the first transaction was upheld. It may be regarded as therefore settled law that where there are two sales leading to export the first under which goods are procured for sale and the property in the goods passes within the territory of India, and the second by the buyer to a foreign party resulting in export—the first cannot be regarded as a sale in the course of export, for a sale in the course of export must be directly and integrally connected with the export. It cannot also be predicated that every sale which results in export is to be regarded as sale in the course of export. We may briefly refer to the cases which have come before this Court. Justification for citation of the cases is not to evolve a principle from the actual decision, but to highlight the grounds on which the decisions were rendered. The first case which came before this Court in which Article 286 (1) (b) fell to be construed was *The State of Travancore-Cochin and others v. The Bombay Company Ltd*¹. The assessee who had exported coir products to foreign purchasers claimed exemption from sales tax relying upon Article 286 (1) (b). The Revenue authorities held that property in the goods having passed within the State, the transactions were liable to tax. The High Court disagreed with that view, holding that a sale in the course of export was not merely a sale when the goods had crossed the customs frontiers, but included a transaction which preceded export. This Court agreed with the High Court. In appeal Patanjali Sastri, C.J., speaking for the Court observed that sales which occasioned export were within the scope of the exemption under Article 286 (1) (b). But that was a case in which on the facts found there could be no dispute that the sale by the assessee occasioned export, for in pursuance of the contract the assessee had exported the goods sold.

The next case which came before this Court was *The State of Travancore-Cochin and others v. Shanmugha Vilas Gashew Nut Factory and others*². It was held by this Court that purchases in the State made by the exporters for the purpose of export are not within the exemption granted by Article 286 (1) (b) of the Constitution. Patanjali Sastri, C.J., speaking for the majority of the Court observed :

“The word ‘course’ etymologically denotes movement from one point to another, and the expression ‘in the course of’ not only implies a period of time during which the movement is in progress but postulates also a connected relation; * * * A sale in the course of export out of the country should similarly be understood in the context of clause (1) (b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities.”

He further observed that the phrase “integrated activities” cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction. It is in that sense that the two activities—the sale and the export—were said to be integrated. But a purchase for the purpose of export like production or manufacture for export, being only an act preparatory to export could not be regarded as an act done “in the course of the export of the goods out of the territory of India.”

1. (1952) S.C.J. 527 : (1953) 1 M.L.J. 1 : (1952) S.C.R. 1112 : A.I.R. 1942 S.C. 366.

2. (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 : (1954) S.C.R. 53 : A.I.R. 1953 S.C. 333.

In *The State of Madras v Gurniah Naidu and Company Ltd*¹, S.R. Das, Actg^g C.J. observed that an assessee who goes about purchasing goods after securing orders from foreign purchasers is not exempt from liability to pay tax by virtue of Article 286 (1) (b) of the Constitution in respect of the purchases made by him because those purchases do not themselves occasion the export. Goods were undoubtedly bought for the purpose of export but the purchase did not occasion the export within the meaning of Article 286 (1) (b) of the Constitution.

In *State of Mysore and another v Mysore Shipping and Manufacturing Co., Ltd and others*², it was held that where goods were sold to a licensed exporter by the assessee and the licensed exporter sold the goods to a foreign purchaser it could not be said that the first sale was in the course of export. The licensed exporter was not an agent of the assessee and the two sales could not have both occasioned the export. It was only the second sale which did that, and the assessee not being a party to it either directly or through the exporter or through his agents the first sale with which alone the assessee was associated did not occasion the export. If it did not then it hardly matters whether the goods were exported through the instrumentality of the exporter or not because all sales that precede the one that occasioned the export were taxable. In this case the Court expressed the opinion that for the sale to be one which occasions the export it must directly concern the assessee as an exporter.

In *East India Tobacco Company v The State of Andhra Pradesh and another*³, this Court held that only the sale under which the export is made is protected by Article 286 (1) (b) of the Constitution and a purchase made locally by a firm doing business of exporting tobacco, which preceded the export sale did not fall within its purview though it is made for the purpose of or with a view to export.

One more judgment of this Court may be noticed *B.K. Wadgaonkar v M/s Daulatram Rameshwarlal*⁴. The assessee in that case sold goods to an Indian purchaser who had agreed to sell them to a foreign buyer. The sales by the assessee "were on F.O.B. contracts under which they continued to be owners" till the goods crossed the customs barrier and entered the export stream. It was held by this Court that since the goods remained the property of the assessee till they reached the export stream the sales were exempt from tax imposed by a State under Article 286 (1) (a). This was undoubtedly a case of two sales resulting in export and the first sale was held immune from State taxation—but that was so because the property in the good had passed to the Indian purchaser when the goods were in the export stream. The first sale itself was so inextricably connected with the export that it was regarded as a sale in the course of export.

Mr Setalvad on behalf of the appellants placed strong reliance upon the judgment of the Madras High Court in *M.R.K. Abdul Salam & Company v The Government of Madras*⁵. That was a case in which a dealer in the State of Madras in hides and skins after purchasing raw hides tanned them and sent them to Kovai Tanned Leather Co., Madras who acted as the dealer's agent for sale. Kovai Tanned Leather Company sold the goods to Dharamsi Parpia who acted as an agent of Siven Brothers (Eastern) Ltd, London. There was another transaction between Kovai Tanned Leather Co. and Gordon Woodroffe and Company Ltd, who acted as agents for a foreign principal. The Sales Tax Tribunal refused to accept the transaction to Dharamsi Parpia as an export sale on the ground that Kovai Tanned Leather Company delivered the goods to the exporter Dharamsi Parpia and thereafter the exporter obtained the bills of lading and that the sale became complete in the Madras State before shipment and it was on that account not a sale in the course of export. The High Court disagreed with that view. Jagadisan J., speaking for the Court observed

1 A.I.R. 1956 S.C. 158

2 A.I.R. 1958 S.C. 1002

3 13 S.T.C. 529

4 (1961) 1 S.G.R. 974

5 13 S.T.C. 629.

"Where there is privity of contract between the foreign buyer and the seller in the taxing territory and the concluded sale between them occasions the export even if the property in the goods sold passes within territory the transaction is nevertheless one in respect of which Article 286 imposes a ban on the State to levy tax."

We are not concerned to decide whether there was evidence in that case on which the High Court could come to the conclusion that the sale occasioned the export. But Mr. Setalvad relied upon the observation in support of the proposition that in all cases where there is a contract for purchase of goods in the taxing territory, between a local merchant and a foreign buyer acting through his agent, and the goods are after purchasing the same exported by the agent, the transaction must be deemed to be one in the course of export. We are unable to accept that contention. We do not read the judgment as laying down any such proposition, and none such is legitimately deducible. The second transaction in favour of Gordon Woodroffe & Co., was found to be one in which property in the goods passed beyond the customs frontier. Such a transaction would indisputably be a sale in the course of export.

In our view the transaction of sale in the present case did not occasion the export of the goods, even though the appellants knew that the buyers in offering the bids for chests of tea and export quotas were acting on behalf of foreign principals, and that the buyers intended to export the goods. There was between the sale and the export no such bond as would justify the inference that the sale and the export formed parts of a single transaction or that the sale and export were integrally connected. The appellants were not concerned with the actual exportation of the goods, and the sales were intended to be complete without the export, and as such it cannot be said that the said sales occasioned export. The sales were therefore for export, and not in the course of export.

The appeals therefore fail and are dismissed with costs. One hearing fee.

Rajagopala Ayyangar, J.—(for *Wanchoo, J.*, and himself)—We regret our inability to concur in the order that these appeals should be dismissed. We are clearly of the opinion that the appeals should be allowed.

This batch of 18 appeals which have been heard together are directed against a common judgment of the High Court of Kerala and are before this Court by virtue of Special Leave granted to the appellants. The appellants filed writ petitions in the High Court which were dismissed by the learned Single Judge whose judgment was affirmed on appeal by a Bench of the High Court. It is from this judgment that these appeals have been brought.

The appellants are 18 tea estates which are carrying on the business of growing and manufacturing tea in their estates. Their claim is that the teas grown by them have been sold by them "in the course of the export of goods out of the territory of India" within Article 286 (1) (b) of the Constitution and they, therefore, claim that the State of Travancore-Cochin in which these sales took place was not entitled to impose sales tax upon these sales.

The question for consideration is whether these sales affected by the Appellants are, as they claim, sales "in the course of export." It is common ground that the tea sold under the transactions involved in these appeals was actually exported out of the territory of India. Doubtless, this circumstance would not *per se* render the sales which preceded the export "sales in the course of export" but the argument submitted to us is that these exports are so directly and immediately linked up with the sales effected by the appellants and so integrated with them that the two form part of the same transaction as to render the sales "sales in the course of export."

It was presented in this form, relying on the decision of this Court in *State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*¹, where the learned Chief Justice observed :

"The word 'course' etymologically denotes movement from one point to another and the expression 'in the course of' not only implies a period of time during which the movement is in progress but postulates also a connected relation. A sale in the course of export out of the country should be understood in the context of Article 286 (1) (b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country, but also as part of or connected with such activities. The previous decision emphasised the integral relation between the two where the contract of sale itself occasioned the export as the ground for holding that such a sale was one taking place in the course of export."

It is this integrality that is involved in the concept which is expressed by the words that "the sale that occasions the export" is a sale in the course of export."

The details of the sales on which tax is sought to be levied by the respondent, together with the facts relating thereto, as well as the several contentions urged before us and the decision on which reliance is placed on either side have all been narrated in the judgment just now pronounced and we do not think it necessary to restate them. Similarly, the provisions of the Tea Act, 1953 and the Rules framed thereunder so far as they are relevant for the decision of the question involved in these appeals have also been set out and so we are not repeating them either. We shall confine ourselves to the very restricted area of our disagreement with our learned brethren which has occasioned this separate judgment.

As preliminary to the discussion of the question involved, we shall put aside certain types of transactions as regards which there is no dispute that they clearly fall on one side of the line or the other. On the one side of the line would be the case where a seller in pursuance of a contract of sale with a foreign buyer puts the goods sold on board a ship bound for a foreign destination. Such a sale would be an "export sale" which would undoubtedly be within the constitutional protection of Article 286 (1) (b). In regard to this type, however, we would make this observation. In such a case we consider that it would be immaterial whether or not with reference to the provisions of the Sale of Goods Act, read in conjunction with the terms and stipulations of any particular contract, the property in the goods passes to the buyer on the Indian side of the customs frontier or beyond it. In either event the sale would have occasioned the export, for the sale and the export form one continuous series of transactions, the one leading to the other—not merely in point of time but integrated by reason of a common intention which is given effect to. In such a case it would be seen that there is but one sale—to the foreign buyer "which occasions the export", and which is implemented in accordance with the terms of the contract by an actual export which is the *sine qua non* of "a sale in the course of export".

A case on the other side of the line would be one where the sale is effected to a resident purchaser who effects the export by sale of the goods purchased to a foreign buyer. Here the first sale to the buyer who enters into the export sale would not be a "sale in the course of export" for it would not be the particular sale which occasions the export, notwithstanding that the purchase might have been made with a view to effect the export sale, or to implement a contract of sale already entered into with a foreign buyer. That such a sale is not one "in the course of export" has been repeatedly held by this Court (see *State of Travancore Cochin v Shammugha Vilas Cashew Nut Factory*¹, *State of Madras v Gurniah Naidu & Co Ltd*², *State of Mysore v Mysore Spinning and Manufacturing Co Ltd*³ and *East India Tobacco Co v The State of Andhra Pradesh*⁴).

This second type of case involves two sales—one to a resident purchaser who purchases it with a view to effect an export and the second, the export sale or sale in the course of export by the purchaser to a foreign buyer. The existence of the two sales and the consequent dissociation between the first sale and the export causes a hiatus between that sale and the export and destroys the integrality of the two events or transactions viz, the sale and the factual export.

1 (1954) SCR 53 AIR 1953 SC 333
(1953) SCJ 471 (1953) 2 MLJ 123

2 AIR (1956) SC 158 6 STC 717.

3 AIR (1958) SC 1002

4 13 STC 529

The sales involved in the present appeals are not of the 2nd type for here there is a single sale direct to a foreign buyer, the contract being concluded with and the goods sold delivered to his agent. It is hardly necessary to add that for purposes relevant to the decision of the question before us there could be no difference in legal effect between a sale to a foreign buyer present in India to take delivery of the goods for transport to his country and a sale to his resident agent for that purpose. Pausing here we should mention that there is no dispute: (1) that the persons who bid at the auction at Fort Cochin and purchased the teas of the assesseees were agents of foreign buyers; or (2) regarding their having made these purchases under the directions of their foreign principals in order to despatch the goods to the latter—a contractual obligation that they admittedly fulfilled.

Under the sales here involved, though to foreign buyers and intended for export; the goods were not under the terms of the contract of sale placed by the seller on board the ship in the course of its outward voyage and that is the only reason why they do not conform strictly to the first type of an export sale which we have described earlier.

But the question is, do not these sales also “occasion the export” and in that sense sales “in the course of export”. The test which has been laid down by this Court for determining the proximity of the connection between the sale and the export so as to bring the sale within the constitutional exemption in Article 286 (1) (b) is the integrality of the two events—the sale and the export. The question to be answered is therefore whether the sales now under consideration do not form part and parcel of a single integrated transaction with the export or are they distinct, distant and mediate, the sale and the export being related to each other only in the sense of one leading to the other or the one succeeding the other merely in point of time. If the former, the sales are within Article 286 (1) (b), but if the connection between the two is as described latter, they are outside the exemption.

What then are the facts of the present case? Before restating them for their being examined in the light of the *criteria* we have just specified, it is necessary to emphasise certain matters. When the assesseees sought an opportunity to adduce evidence as to the facts which they offered to prove to establish their claim to the constitutional protection, the assessing authorities accepted their statements as correct and did not desire them to adduce evidence and so no detailed evidence was led. If therefore on an examination of the legal position it is now found that there is any lacunae in the statement of facts or in the evidence whose existence would have brought the sales within the exemption, it appears to us that the appellant assesseees should in fairness be afforded an opportunity to adduce evidence to establish their case. We say so particularly because it could by no means be said that the law was clear as to the facts necessary to be proved to claim exemption in the case of sales of the type now before us.

To proceed with the facts, the assesseees had applied for and obtained export quotas with a view to effect exports of a quantity of tea grown and processed by them. The sales at Fort Cochin were effected along with the export rights granted to the Appellant estates, the contract being that the purchaser at the auction would obtain a transfer of the export quota right of that estate whose tea he purchased to the extent needed to effect export of the tea purchased. The purchases were thus made only on the basis that the export rights of the seller would be transferred to the buyer and on the basis of these transfers, the purchasers obtained export licences from Government for exporting the tea and effected the exports. The purchases were made by agents of foreign principals and it was part of the contractual duty of these agents *vis-a-vis* the principals to consign the goods purchased to them without avoidable delay. There was proof by the certificates produced that these agents had fulfilled their obligations to their principals and had shipped the goods bought as early as practicable to foreign destinations.

The principal contention urged by the learned Advocate-General of Kerala to persuade us to hold that the sales did not “occasion the export” was based

on two circumstances (1) that it was not part of the contract between the assessee and their buyers that the goods shall only be exported and not sold in the local market. In other words, it was urged that in the absence of such a specific term of contract it would have been open to the buyers to have diverted the goods from being exported and to have sold them locally. This was so far as the contractual relationship between the assessee-sellers and the buyers from them under the sale was concerned. (2) Dealing next with the effect of the provisions of the Tea Act, 1953 and the Rules framed thereunder on the sales effected by the assessee, the submission was that section 21 and other provisions of the Tea Act 1953 merely enabled an export to be effected and did not require the goods in regard to which they were issued to be exported. In other words, it was stressed that the Tea Act did not impose any obligation on the quota holder or his transferee to export the goods covered by the quota and that consequently the buyer—even after taking a transfer of the export quota rights along with his purchase was not compelled by law to export and was not precluded from failing to export and selling the goods locally. On this reasoning the argument was that there was a purchase under which the purchaser was free to export or not to export and the mere fact that he chose to export would not render the sale to him one which occasioned the export or one ‘in the course of export’.

We consider that these arguments do not sufficiently take into account the actualities of the situation, but proceed on investing on formal requirements a significance which is not warranted.

When learned Counsel says that there was no term in the contract between the seller and the buyer that the goods purchased were not to be sold locally but have to be exported, he is right only in the sense that it is not any express term of the contract. But could it be said that that was not the implicit common understanding on which the entire transaction was concluded. The buyer was not interested in the purchase except on terms of the export quota rights being transferred to him and that was why the transfer of the export right was effected or contracted to be effected as part and parcel of the sale of the goods. Again, the buyer was an agent, who as we have stated earlier was not free to deal with the tea purchased by effecting a local sale, but was under an obligation to his foreign principal to export the goods purchased to a foreign destination. It was with such a buyer that the assessee entered into the transaction of sale. On these facts we are satisfied that it was part of the understanding between the seller and the buyer, inferable from all the circumstances attendant on the transaction that the buyer was bound to export. Pausing here, we would add that, we understand that importance is attached in this context to the need of a term in the sale contract laying an obligation on the part of the buyer to export only for the purpose of demonstrating the intimate connection between the sale and the support for establishing that it was the sale that occasioned the export. If we are right, then what is of significance is the real and common intention of the two parties to the transaction—whether they contemplated the goods purchased being sold locally, or whether they intended the goods sold being only exported and not whether there is such a term in the contract between the parties.

Coming next to the contention that the Tea Act does not compel export of goods covered by the quotas granted we might mention that no evidence was led as to the prices prevailing in the local market as compared to that in the foreign countries where the principals of the resident buyers resided, which would have disclosed whether a local sale of the tea bought ostensibly for export was in a commercial sense within the bounds of possibility, though if one went by the rationale underlying the provisions of the Tea Act and in particular in sections 17, 21 and 22, one gets the impression that export quota rights were considered to have a considerable value in the market which would be some indication that a buyer with an export quota would never sell in the local market. Thus it might be that even though the statute does not in terms prohibit internal sale of tea purchased along with export

quota rights, this could be explained by the circumstance that the right to export tea is considered a privilege which secures economic advantages to the exporter and hence there was no need for any statutory compulsion to do so. We are making this observation because Parliament and the Central Government are keen on promoting exports and in the case of some commodities like sugar where the external price is lower than the local price, the regulations framed in that behalf require exports to be effected under compulsion. We consider therefore that the absence of a compulsive provision in the Tea Act requiring export of the quantity allotted to the estates, is not very material and that Parliament might well have left it optional with the estate owners to export seeing that economic factors provided the requisite compulsion.

If there was a contract or understanding between the buyer and seller by which the latter was to export the goods bought, it is conceded the sale of the assessee did occasion the export and in our view on the facts established, we consider this condition satisfied.

We would therefore allow the appeals and set aside the assessment in so far as they included the sales involved in these appeals.

ORDER OF THE COURT :—In accordance with the opinion of the majority, the appeals are dismissed with costs. One hearing fee.

K.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—K. SUBBA RAO, K. N. WANCHOO, M. HIDAYATULLAH, RAGHUBAR DAYAL AND S. M. SIKRI, JJ.

P. Vajravelu Mudaliar and another

*Petitioner**

v.

The Special Deputy Collector, Madras and another

Respondents.

Land Acquisition (Madras Amendment) Act (XXIII of 1961)—Constitutional validity—Article 31-A of the Constitution—Applicability—Act if discriminatory and offends Article 14 of the Constitution of India (1950)—Article 31 (2) if infringed by the Act.

Article 31-A of the Constitution would apply only to a law made for acquisition by the State of any "estate" or any rights therein or for extinguishment or modification of such rights if such acquisition, extinguishment or modification is concerned with agrarian reforms.

The Land Acquisition (Madras Amendment) Act XXIII of 1961 in its comprehensive phraseology takes in acquisition for any housing scheme, whether for slum clearance or for creating modern suburbs or for any other public purpose. The provisions of the Amending Act are not confined to any agrarian reform and, therefore, do not attract Article 31-A of the Constitution.

Neither the principles prescribing the "just equivalent" nor the "just equivalent" can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the Legislature committed a fraud on power and, therefore, the law is bad. It is a use of the protection of Article 31 in a manner which the Article hardly intended.

If the Legislature makes a law for acquiring property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made the law in fraud of its powers. If the question pertains to the adequacy of compensation, it is not justiciable; if the compensation fixed on the principles evolved for fixing it disclose that the Legislature made the law in fraud of its powers the question is within the jurisdiction of the Court.

The Land Acquisition Madras Amending Act does not offend Article 31 (2) of the Constitution. In awarding compensation if the potential value of the land is excluded (as in the impugned Act) it cannot be said that the compensation awarded is the just equivalent of what the owner has been deprived of. But such an exclusion only pertains to the method of ascertaining compensation which results in inadequacy of the compensation, but that in itself does not constitute fraud on power.

In the instant case it could not be said that the lands were being acquired (at a low price to be resold at higher prices) as a device to improve the revenue of the State.

The Amending Act (Madras Act XXIII of 1961) is hit by Article 14 of the Constitution. The Amending Act empowers the State to acquire land for housing schemes at a price lower than that the State has to pay if the same was acquired under the Principal Act (Land Acquisition Act I of 1894). Discrimination is writ large on the Amending Act and it cannot be sustained on the principle of reasonable classification. The Amending Act clearly infringes Article 14 of the Constitution and is clearly void.

Petitions under Article 32 of the Constitution of India for enforcement of fundamental rights

A V Viswanatha Sastri, Senior Advocate, for Petitioners in all the petitions

A Ranganadham Ghetty Senior Advocate, *R Viswanathan* Special Government Pleader and *A V Rangam* for Respondent (State of Madras) in all the petitions

Prakasa Rao and *R Gopalakrishnan*, for Respondents in Petition No 144 of 1963

Palkhvala, for Intervenor

S S Shukla for State of Gujarat (Intervenor)

B R. L. Ayengar, *R H Dhebar*, *B K G Achar*, for State of Maharashtra (Intervenor)

C K Daphary, Attorney General of India, with *R H Dhebar* and *R N Sahitya*, for the State of Rajasthan (Intervenor)

I N Shroff, for State of Madhya Pradesh (Intervenor)

The Judgment of the Court was delivered by

Subba Rao, J —These three petitions filed under Article 32 of the Constitution raise the question of the constitutional validity of the Land Acquisition (Madras Amendment) Act, 1961 (Madras Act XXIII of 1961), hereinafter called the Amending Act. We shall briefly state the facts relevant to the question raised. The petitioner in Writ Petition No 144 of 1963, *P Vajravelu Mudaliar*, is the owner of lands bearing Survey Nos 42, 40-7 and 431 of Peruakudal Village and of extents 182, 139 and 372 acres respectively. By a notification dated 7th November, 1960, and published in the *Fort St George Gazette* dated 16th November, 1960, the Government issued a notification under section 4 (1) of the Land Acquisition Act (I of 1894), hereinafter called the Principal Act notifying that, among other lands, the said lands of the petitioner were needed for a public purpose, to wit, for the development of the area as "neighbourhood" in the Madras City in accordance with the Land Acquisition and Development Scheme of the Government. On 23rd November, 1960, the Special Deputy Collector for Land Acquisition issued a notification under section 4 (1), read with section 17 (4), of the Principal Act, and under the said notification the first respondent was authorised to take possession of the petitioner's lands. The Madras Legislature subsequently enacted the Amending Act providing for the acquisition of lands for housing schemes and laying down principles for fixing compensation different from those prescribed in the Principal Act. The petitioner questions the validity of the Amending Act, *inter alia*, on the ground that it infringes Articles 14, 19 and 31 (2) of the Constitution.

The petitioner in Writ Petitions Nos 227 and 228 of 1963, Most Rev Dr L^a Mathias, Archbishop of Madras, owns lands bearing Survey Nos 172 B 1 and 1272 B of extent 5053 acres and 062 ares respectively in Urur, near Madras City. By notification dated 13th November, 1961, and published in the *Fort St George Gazette*, the Government of Madras issued a notification under section 4 (1) of the Principal Act notifying among other lands, that the said lands of the petitioner were needed for a public purpose, to wit, for the development of the area as the "neighbourhood" in Madras City in accordance with the Land Acquisition and Development Schemes of the Government. It was also stated in the notification that in view of the urgency, under section 17 (4) of the Principal Act, the application of the provisions of section 5 (a) of the said Act was dispensed with, and that compen-

sation in respect of the said acquisition would be paid in accordance with the provisions of the Amending Act.

The said petitioner (in W.P. No. 228 of 1963) also owns lands bearing Survey Nos. 153/1 and 154/2 at Tiruvannamipur village, Chingleput District, of the extent 21.56 and 10.50 acres respectively totalling about 32 acres. The said lands were also notified for acquisition and the petitioner was told that he would be paid compensation under the Amending Act.

The said petitioner in these two petitions questions the constitutional validity of the said Amending Act on the ground, *inter alia* that it offends Articles 14, 19 and 31 (2) of the Constitution.

To the three petitions the Special Deputy Collector for Land Acquisition, West Madras, and the Government of Madras are made parties. In their counters the respondents pleaded among others, that the said Act was saved under Article 31-A of the Constitution and, therefore, its validity could not be questioned on the ground that it infringes either Article 14, 19 or 31 (2) of the Constitution; and that even if Article 31-A was not attracted, the provisions of the Amending Act would not infringe any of the said three provisions. In these petitions some intervenors are represented by their Counsel and this Court had also given notices to the Advocates-General of various States. We have heard the arguments advanced on behalf of the petitioners, intervenors, and the State of Madras and the Counsel on behalf of the Advocates-General of some of the States who supported the State of Madras.

Mr. A. V. Viswanatha Sastri, learned Counsel for the petitioners, raised before us the following points: (1) As the Madras State Housing Board Act, 1961, and the Madras Town Planning Act, 1920, are special statutes providing for the execution of housing and improvement schemes and town planning schemes respectively, property for the said schemes can be acquired only after following the procedure prescribed thereunder and the Government has no power to acquire land for the said purpose under the Amending Act in derogation of the provisions of the former Act. (2) The acquisition, though it purports to be for a housing scheme, is really intended for selling the lands acquired and raising revenue for the State and it is, therefore, a colourable exercise of the State's power. (3) The Amending Act offends Articles 14 and 19 of the Constitution. And (4) the Amending Act is also bad, because it does not provide for payment of compensation within the meaning of Article 31 (2) of the Constitution.

Mr. A. Ranganadham Chetty, learned Counsel for the State of Madras contends that, (i) the Government in its discretion has the power to acquire land for housing purposes under any one of the three Acts, namely the Housing Board Act, the Town Planning Act and Amending Act; (ii) by reason of the Constitution (Seventeenth Amendment) Act, 1964, which is retrospective in operation, the petitioners are precluded from questioning the validity of the Amending Act on the ground that it infringes Article 14, 19 or Article 31 of the Constitution; (iii) the Amending Act does not infringe either Article 14 or Article 19 of the Constitution; and (iv) after the Constitution (Fourth Amendment) Act, 1955, the expression 'compensation' carries a meaning different from that given to it in *Mrs. Bela Banerjee's case*¹, and thereafter the adequacy of the amount given for acquisition of land ceased to be justiciable.

Mr. Palkhivala, appearing for some of the intervenors elaborated the contention of Mr. A. V. Viswanatha Sastri based upon the meaning of the expression 'compensation' in Article 31 (2) of the Constitution. We shall consider his argument in the relevant context in the course of our judgment.

The first question need not detain us, for though Mr. Viswanatha Sastri raised the point that the Government can only acquire the lands for housing schemes in conformity with the provisions of either the Madras Town Planning Act, 1920,

or the Madras State Housing Board Act, 1961, but not under the provisions of the Amending Act, he did not pursue the matter in view of the following two decisions of this Court *Patna Improvement Trust v Smt Lakshmi Devi*,¹ and *Nandeshwar Prasad v. U P Government*.² Therefore, nothing more need be said about this.

Mr A Ranganadham Chetty relied upon the Constitution (Seventeenth Amendment) Act, 1964, and contended that Article 31-A, as amended, precluded the petitioners from questioning the validity of the Amending Act on the ground that it infringed Article 14, 19 or 31 of the Constitution. By the said amendment, in the definition of the expression 'estate' sub-clause (a) of clause (2) was substituted by a new sub-clause defining the said expression. The material part of the amended sub-clause (a) of clause (2) reads

'the expression 'estate' shall in relation to any local area have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include

(u) any land held under ryotwari settlement.'

From the material on record we cannot definitely hold whether the lands in question are held under ryotwari settlement. But assuming for the purpose of these petitions that the said lands are held under ryotwari settlement, the question arises whether the impugned law provides for acquisition by the State of any 'estate' or any rights therein or the extinguishment or modification of any such rights. The scope of this provision fell to be considered by this Court in *K K Kochum v The State of Madras*.³ There it was held that though the impugned Act dealt with an estate, it was not saved by Article 31-A of the Constitution, as the Act had nothing to do with agrarian reform but simply conferred on junior members of the *tarwad* joint rights which they had not got before in the *sthanam* properties. Mr Ranganadham Chetty criticized this decision on the ground that the said view was based only on a part of the Statement of Objects and Reasons and that the omitted part thereof supported a wider construction of the provisions so as to include acquisition of a land for slum clearance or other such social purposes. The omitted part of the Statement read thus

'(u) The proper planning of urban and rural areas require the beneficial utilisation of vacant and waste lands and the clearance of slum areas."

It is true that in the said decision the Statement of Objects and Reasons relevant to the question raised therein was extracted, but it was made clear that it was referred only for the limited purpose of ascertaining the conditions prevalent at the time the Bill was introduced in Parliament and the purpose for which the amendment was made. It is common place that a Court cannot construe a provision of the Constitution on the basis of the Statement of Objects and Reasons, and thus Court did not depart from the said salutary rule of construction. The real basis of that decision is found at page 900 and it is

'The definition of 'estate' refers to an existing law relating to land tenures in a particular area indicating thereby that the Article is concerned only with the land tenure described as an 'estate'. The inclusive definition of the rights of such an estate also enumerates the rights vested in the proprietor and his subordinate tenure-holders. The last clause in that definition *viz*, that those rights also include the rights or privileges in respect of land revenue emphasizes the fact that the Article is concerned with land tenure. It is therefore manifest that the said Article deals with a tenure called 'estate' and provides for its acquisition or the extinguishment or modification of the rights of the land holder or the various subordinate tenure holders in respect of their rights in relation to the estate. The contrary view would enable the State to divest a proprietor of his estate and vest it in another without reference to any agrarian reform.'

This judgment, therefore in effect, held that Article 31-A (1) (a) should be confined to an agrarian reform and not for acquiring property for the purpose of giving it to another. This Court in *Ranjit Singh v The State of Punjab*,⁴ considered the scope of the said decision. The question that arose in that case was whether the East Punjab

1 (1963) 2 S.C.R. (Supp.) 812 A.I.R. 1963 887, 900
S.C. 1077

2 A.I.R. 1964 S.C. 1217

3 (1961) 2 S.C.J. 443 (1960) 3 S.C.R.

4 C.A. No. 743 of 1963 (decided on 20th August, 1964)

Holdings (Conservation and Prevention of Fragmentation Act, 1948) (L of 1948) as amended by the East Punjab Holdings (Consolidation and Prevention of Fragmentation) (2nd Amendment and Validation) Act, 1960 (XXVII of 1960) was protected by Article 31-A against an attack on the ground that the said Act infringed the fundamental rights under Articles 13, 14, 19 and 31 of the Constitution. This Court considered the earlier decisions of this Court, including the decision in *K. K. Kochuni v. State of Madras*¹. Adverting to *Kochuni's case*,¹ Hidayatullah J., speaking for the Court, observed :

"But that was a special case and we cannot apply it to cases where the general scheme of legislation is definitely agrarian reform and under its provisions something ancillary thereto in the interests of rural economy has to be undertaken to give full effect to the reforms."

Apropos the Act before it, this Court observed :

"The scheme of rural development today envisages not only equitable distribution of land so that there is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few on the other but envisages also the raising of economic standards and bettering rural health and social conditions."

That judgment, therefore, accepts the view that Article 31-A was enacted only to implement agrarian reform, but has given a comprehensive meaning to the expression "agrarian reform" so as to include provisions made for the development of rural economy.

Under Article 31 (2) and (2-A) of the Constitution a State is prohibited from making a law for acquiring land unless it is for a public purpose and unless it fixes the amount of compensation or specifies the principles for determining the amount of compensation. But Article 31-A lifts the ban to enable the State to implement the pressing agrarian reforms. The said object of the Constitution is implicit in Article 31-A. If the argument of the respondents be accepted, it would enable the State to acquire the lands of citizens without reference to any agrarian reform in derogation of their fundamental rights without payment of compensation and thus deprive Article 31 (2) practically of its content. If the intention of Parliament was to make Article 31 (2) a dead-letter, it would have clearly expressed its intention. This Court cannot by interpretation enlarge the scope of Article 31-A. On the other hand, the Article, as pointed out by us earlier, by necessary implication, is confined only to agrarian reforms. Therefore, we hold that Article 31-A would apply only to a law made for acquisition by the State of any 'estate', or any rights therein or for extinguishment or modification of such rights if such acquisition, extinguishment or modification is connected with agrarian reforms.

Mr. Ranganadham Chetty contended that acquisition for housing under the Amending Act is for slum clearance and for relieving congestion of housing accommodation and that acquisition for such a purpose would be in connection with agrarian reform in the enlarged sense of that expression accepted by this Court. Even accepting the argument of the learned Counsel that the Act was conceived and enacted only for the purpose of slum clearance which became an urgent problem for the City of Madras, we cannot hold that such a slum clearance relates to an agrarian reform in its limited or wider sense. That apart, the Amending Act in its comprehensive phraseology takes in acquisition for any housing scheme, whether for slum clearance or for creating modern suburbs or for any other public purpose. The provisions of the Amending Act are not confined to any agrarian reform and, therefore, do not attract Article 31-A of the Constitution.

If Article 31-A of the Constitution is out of the way, Mr. Viswanatha Sastri, learned Counsel for the petitioners, contended that the Act is bad as it does not provide for compensation i.e., a 'just equivalent' for the land acquired under the Amending Act and, therefore, it offends Article 31 (2) of the Constitution. This aspect is elaborated by Mr. Palkhivala, who appeared for one of the interveners in the petitions. He narrated the following for situations : (i) when the law provides for adequate compensation but there is difference of opinion as to the adequacy of it in a given case ; (ii) where the law provides for partially inadequate considera-

tion based on valid principles related to the property at the time of acquisition, (ii) where it fixes arbitrarily the compensation based on principles unrelated to the property or to the time of acquisition or to both, (iv) where the compensation fixed is illusory, and contended that in the first situation compensation is paid, that in the second it is a moot question whether the question of adequacy of compensation is justiciable or not, and that in the third and fourth situations, the said question is clearly justiciable. Mr Ranganadham Chetty, appearing for the State, on the other hand argued that the question of adequacy of consideration however it arose was not justiciable in a Court of law. To appreciate the contentions it is necessary to consider the following questions: (i) what was the scope of the relevant part of Article 31 (2) of the Constitution before the Constitution (Fourth Amendment) Act, 1955? (ii) why was that amendment brought about? (iii) what was the change the amendment introduced? and (iv) what was the effect of the amendment?

Article 31 (2) before the said amendment read as follows —

‘No property shall be taken possession of or acquired for public purposes unless the law provides for compensation for the property taken possession of or either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given.’

In *Mrs Bela Banerjee's case*¹, this Court was called upon to consider the question whether compensation provided for under the West Bengal Land Development and Planning Act, 1948, was in compliance with the provisions of Article 31 (2) of the Constitution. Under the said Act lands could be acquired many years after it came into force, but it fixed the market value that prevailed on 31st December, 1946, as the ceiling on compensation without reference to the value of the land at the time of acquisition. In that context this Court considered the provisions of Article 31 (2) of the Constitution and came to the following conclusion, at page 563 564 —

‘While it is true that Legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated such principles must ensure that what is determined as payable must be compensation, that is a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court.’

By applying the said principles this Court held that the provisions of the said Act fixing a ceiling on compensation without reference to the value of the land was arbitrary and, therefore, was not in compliance with, in law and spirit, the requirement of Article 31 (2) of the Constitution. This decision lays down three points namely, (i) the compensation under Article 31 (2) shall be ‘just equivalent’ of what the owner has been deprived of, (ii) the principles which the Legislature can prescribe are only principles for ascertaining a just equivalent of what the owner has been deprived of, and (iii) if the compensation fixed was not a just equivalent of what the owner has been deprived of, if the principles did not take into account all relevant elements or took into account irrelevant elements for arriving at the just equivalent, the question in regard thereto is a justiciable issue. This Court therefore, authoritatively interpreted Article 31 (2) of the Constitution and laid down its scope. This view was reiterated by this Court in *State of Madras v. Namaswami Mudaliar*². There the question was whether sections 2 and 3 of the Madras Lignite (Acquisition of Land) Act XI of 1953 which sought to amend the Land Acquisition Act I of 1894 were invalid because they infringed the fundamental rights under Article 31 of the Constitution of owners of lands whose property was to be compulsorily acquired. Under that Act, compensation made payable for compulsory acquisition of land was the value of the land on 28th April, 1947, together

¹ (1954) S.C.J. 95 (1954) 1 M.L.J. 162
(1954) S.C.R. 558 (563-564) A.I.R. 1954 S.C.

² C.A. Nos. 6-12 of 1963 decided on 3rd March, 1964

with the value of any agricultural improvements made thereon after that date and before publication of the notification under section 4 (1). The result of that Act was to freeze for the purpose of acquisition the prices of land in the area to which it applied and the owners were deprived of the benefit of appreciation of land values since 28th April, 1947, whenever the notification under section 4 (1) might be issued and also of non-agricultural improvements made in the land after 28th April, 1947. That Act was passed before the Constitution (Fourth Amendment) Act, 1955 was enacted and therefore, the question fell to be considered on the Article as it existed before the amendment. After noticing the relevant provisions and the case-law on the subject Shah, J., speaking for the Court said:

"Fixation and compensation for compulsory acquisition of lands notified many years after the date, on the market value prevailing on the date on which lignite was discovered is wholly arbitrary and inconsistent with the letter and spirit of Article 31 (2) as it stood before it was amended by the Constitution (Fourth Amendment) Act, 1955. If the owner is by a Constitutional guarantee protected against expropriation of his property otherwise than for a just monetary equivalent it would be impossible to hold that law which authorised acquisition of land not for its true value but for value frozen on some date anterior to the acquisition, on the assumption that all appreciation in its value since the date is attributable to purposes for which the State may use the land at some future date, must be regarded as infringing the fundamental right."

It may, therefore, be taken as settled law that under Article 31 (2) of the Constitution before the Constitution (Fourth Amendment) Act, 1955, a person whose land was acquired was entitled to compensation i.e., a 'just equivalent' of the land of which he was deprived. The Constitution (Fourth Amendment) Act 1955, amended Article 31 (2) and the amended Article reads:

"No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given; and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate."

A scrutiny of the amended Article discloses that it accepted the meaning of the expressions 'compensation' and 'principles' as defined by this Court in *Mrs. Bela Banerjee's case*¹. It may be recalled that this Court in the said case defined the scope of the said expressions and then stated whether the principles laid down take into account all the elements which make up the true value of the property appropriated and excluded matters which are to be neglected, is a justiciable issue to be adjudicated by the Court. Under the amended Article, the law fixing the amount of compensation or laying down the principles governing the said fixation cannot be questioned in any Court on the ground that compensation provided by that law was inadequate. If the definition of 'compensation' and the question of justiciability are kept distinct, much of the cloud raised will be dispelled. Even after the amendment, provision for compensation or laying down of the principles for determining the compensation is a condition for the making of a law of acquisition or requisition. A Legislature, if it intends to make a law for compulsory acquisition or requisition, must provide for compensation or specify the principles for ascertaining the compensation. The fact that Parliament used the same expression, namely, 'compensation' and 'principles' as were found in Article 31 before the Amendment is a clear indication that it accepted the meaning given by this Court to those expressions in *Mrs. Bela Banerjee's case*¹. It follows that a Legislature in making a law of acquisition or requisition shall provide for a 'just equivalent' of what the owner has been deprived of or specify the principles for the purpose of ascertaining the just equivalent of what the owner has been deprived of. If Parliament intended to enable a Legislature to make such a law without providing for compensation so defined, it would have used other expressions like 'price' 'consideration' etc. In *Craies on Statute Law*, 6th Edition, at page 167, the relevant principle of construction is stated thus:

"There is a well known principle of construction, that where the Legislature used in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted unless a contrary intention appears".

The said two expressions in Article 31 (2) before the Constitution (Fourth Amendment) Act, have received an authoritative interpretation by the highest Court in the land and it must be presumed that Parliament did not intend to depart from the meaning given by this Court to the said expressions.

The real difficulty is, what is the effect of ouster of jurisdiction of the Court to question the law on the ground that the 'compensation' provided by the law is not adequate? It will be noticed that the law of acquisition or requisition is not wholly immune from scrutiny by the Court. But what is excluded from the Court's jurisdiction is that the said law cannot be questioned on the ground that the compensation provided by that law is not adequate. It will further be noticed that the clause excluding the jurisdiction of the Court also used the word "compensation" indicating thereby that what is excluded from the Court's jurisdiction is the adequacy of the compensation fixed by the Legislature. The argument that the word 'compensation' means a just equivalent for the property acquired and, therefore, the Court can ascertain whether it is a 'just equivalent' or not, makes the amendment of the Constitution nugatory. It will be arguing in a circle. Therefore, a more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived by the working of the principles. To illustrate, a law is made to acquire a house, its value at the time of acquisition has to be fixed, there are many modes of valuation, namely, estimate by an Engineer, value reflected by comparable sales, capitalisation of rent and similar others. The application of different principles may lead to different results. The adoption of one principle may give a higher value and the adoption of another principle may give a lesser value. But nonetheless they are principles on which and the manner in which compensation is determined. The Court cannot obviously say that the law should have adopted one principle and not the other, for it relates only to the question of adequacy. On the other hand, if a law lays down principles which are not relevant to the property acquired or to the value of the property at or about the time it is acquired, it may be said that they are not principles contemplated by Article 31 (2) of the Constitution. If a law says that though a house is acquired it shall be valued as land or that though a house site is acquired it shall be valued as an agricultural land or that though it is acquired in 1950 its value in 1930 should be given or though 100 acres are acquired compensation shall be given only for 50 acres, the principles do not pertain to the domain of adequacy but are principles unconnected to the value of the property acquired. In such cases the validity of the principles can be scrutinised. The law may also prescribe a compensation which is illusory; it may provide for the acquisition of a property worth lakhs of rupees for a paltry sum of Rs 100. The question in that context does not relate to the adequacy of the compensation, for it is no compensation at all. The illustrations given by us are not exhaustive. There may be many others falling on either side of the line. But this much is clear. If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the Legislature committed a fraud on power and, therefore, the law is bad. It is a use of the protection of Article 31 in a manner which the Article hardly intended.

This leads us to the consideration of the question of the scope of the doctrine of fraud on power. In *Gajapati Narayan Deo v. The State of Orissa*¹, Mukherjea, J., as he then was, explained the doctrine thus:

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the Legislature. The whole doctrine resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the Legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power."

The learned Judge described how the Legislature may transgress the limits of its constitutional power thus :

"Such transgression may be patent, manifest or direct, but it may also be disguised, covert or indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements".

This Court again explained the said doctrine in *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation*¹, thus:

"The Legislature can only make law within its legislative competency. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The Legislature cannot overstep the field of its competency, directly or indirectly. The Court will scrutinise the law to ascertain whether the Legislature by device purports to make a law which though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact, it has power to make the law, its motives in making the law are irrelevant."

When a Court says that a particular legislation is a colourable one, it means that the Legislature has transgressed its legislative powers in a covert or indirect manner; it adopts a device to outstep the limits of its power. Applying the doctrine to the instant case, the Legislature cannot make a law in derogation of Article 31 (2) of the Constitution. It can therefore, only make a law of acquisition or requisition by providing for "compensation" in the manner prescribed in Article 31 (2) of the Constitution. If the Legislature, though *ex facie* purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation for it, it will be exercising power which it does not possess. If the Legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made the law in fraud of its powers. Briefly stated the legal position is as follows : If the question pertains to the adequacy of compensation, it is not justiciable ; if the compensation fixed or the principles evolved for fixing it disclose that the Legislature made the law in fraud of powers in the sense we have explained, the question is within the jurisdiction of the Court.

The next question is whether the Amending Act was made in contravention of Article 31 (2) of the Constitution. The Amending Act prescribed the principles for ascertaining the value of the property acquired. It was passed to amend the Land Acquisition Act, 1894, in the State of Madras for the purpose of enabling the State to acquire land for housing schemes. 'Housing Scheme' is defined to mean 'any State Government Scheme the purpose of which is increasing house accommodation' and under section 3 of the Amending Act, section 23 of the Principle Act is made applicable to such acquisition with certain modifications. In section 23 of the Principle Act, in sub-section (1) for clause *First* the following clause is substituted :

"*First*, the market value of the land at the date of the publication of the notification under section 4, sub-section (1) or an amount equal to the average market value of the land during the five years immediately preceding such date, whichever is less".

After clause *Sixthly* the following clause was added :

"*Seventhly*, the use to which the land was put at the date of the publication of the notification under section 4, sub-section (1)."

Sub-section (2) of section 23 of the Principal Act was amended by substituting the words in respect of solatium, 'fifteen per centum' by the words "five per centum". In section 24 of the Principal Act after the clause *Seventhly* the following clause was added :

1. (1959) S.C.J. 967 : (1959) 2 An.W.R. (S.C.) 156 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 1 S.C.R. (Supp.) 319, 329 : A.I.R. 1959 S.C. 308.

"*Eightily*, any increase to the value of the land acquired by reason of its suitability or adaptability for any use other than the use to which the land was put at the date of the publication of the notification, under section 4 sub-section (1)

Under section 4 of the Amending Act, the provisions of section 3 thereof shall apply to every case in which proceedings have been started before the commencement of the said Act and are pending. The result of the Amending Act is that if the State Government acquires a land for a housing purpose, the claimant gets only the value of the land at the date of the publication of the notification under section 4 (1) of the Principal Act or an amount equal to the average market value of the land during the five years immediately preceding such date, whichever is less. He will get a solatium of only 5 per centum of such value instead of 15 per centum under the Principal Act. He will not get any compensation by reason of the suitability of the land for any use other than the use for which it was put on the date of the publication of the notification. The second principle is only for a solatium and it is certainly within the powers of the Legislature to fix the quantum of solatium in acquiring the land. Nor can we say that the first principle amounts to fraud on power. In the context of continuous rise in land prices from year to year depending upon abnormal circumstances it cannot be said that the fixation of average price over 5 years is not a principle for ascertaining the price of land in or about the date of acquisition. The third principle excludes what is described by Courts as the tentorial value of the land acquired. When a land is acquired, compensation is predetermined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The Judicial Committee in *Sri Raja Vjricharla Narayana Gajapatraju Bahadur v. The Revenue Divisional Officer, Vizianagaram*¹, held in clear terms that in the case of compulsory acquisition,

* the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined but also by reference to the uses to which it is reasonably capable of being put in the future

In awarding compensation if the potential value of the land is excluded, it cannot be said that the compensation awarded is the just equivalent of what the owner has been deprived of. But such an exclusion only pertains to the method of ascertaining the compensation. One of the elements that should properly be taken into account in fixing the compensation is omitted, it results in the inadequacy of the compensation, but that in itself does not constitute fraud on power, as we have explained earlier. We therefore hold that the Amending Act does not offend Article 31 (2) of the Constitution.

Mr Viswanatha Sastri then contended that though the lands were being acquired for the ostensible purpose of housing schemes, the real purpose was to provide revenue for the State. It is stated that the acquisition is made for and on behalf of the State Housing Board at Rs 50 or 60 per ground, that the said Board sells the lands so acquired to private individuals, including the original owners thereof, if the Housing Board so pleases, at a price of Rs 300 per ground and that it is a device to get revenue for the State. On behalf of the State counter affidavits are filed in the three petitions denying that the lands are being acquired for filling the coffers of the State and stating that the schemes for acquisition are worked out at no-profit no loss basis. It appears from the counter affidavits and the documents filed that there cannot possibly be any sinister motive behind the proposed acquisition. Madras is a growing city. By letter dated 20th October, 1959, the Government of India suggested to the States for taking on hand development schemes. The Government of Madras had considered the question of development of the 'neighbourhoods' of the Madras City for relieving the growing congestion and overcrowding in the City, and after making the necessary enquiries and investigations, by order dated 13th February, 1960, it directed the State Housing Board to take immediate steps for preparing composite layouts for the 'West Madras' and 'Vyasarpadi' areas after fixing up the limits of the areas in the manner indicated by the Board and for the acquisition and development of the areas as 'neighbourhoods'.

in accordance with the Land Acquisition and Development Scheme of the Government of India. It directed the said Board to give priority to the 'West Madras' over the 'Vyasarpadi' area in the matter of preparation of composite lay outs and acquisition. Pursuant to the direction, schemes were framed and acquisition proceedings were initiated. It is stated in the counter-affidavit:

"The lands are being acquired with a view to develop them into composite housing colonies making provision therein to persons in various strata of society, from slum dwellers upwards, and eventually providing for high schools, elementary schools, dispensaries, shopping centres, police stations, and playgrounds and all other community needs, etc."

It is a composite scheme involving heavy expenditure and adjustments of civil demands of the rich and the poor. Whatever profit is made in the sales of land will be pumped back for improving the colony and for providing amenities for the poorer classes of the society. Except the bare statement by the petitioners in their affidavit that the lands cheaply acquired are being sold at higher prices, the averments of the State that the acquisition is part of a larger scheme of building up of a housing colony on modern lines providing for the rich and the poor alike have not been denied. It is not necessary to pursue the matter further. The petitioners have failed to establish that their lands are being acquired as a device to improve the revenue of the State. Indeed, we are satisfied that the lands are being acquired *bona fide* for developing a housing colony.

The last contention of Mr. Viswanatha Sastri is that the Amending Act is hit by Article 14 of the Constitution. The law on the subject is well settled. Under Article 14 the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. But this does not preclude the Legislature from making a reasonable classification for the purpose of legislation. It has been held in a series of decisions of this Court that the said classification shall pass two tests, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons and things left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question. To ascertain whether the impugned Act satisfies the said two tests, three questions have to be posed; namely, (1) what is the object of the Act? (2) what are the differences between persons whose lands are acquired for the housing schemes and those whose lands are acquired for purposes other than housing schemes or between the lands so acquired? and (3) whether those differences have any reasonable relation to the said object. On a comparative study of the Principal Act and the Amending Act, we have shown earlier that if a land is acquired for a housing scheme under the Amending Act, the claimant gets a lesser value than he would get for the same land or a similar land if it is acquired for a public purpose like hospital under the Principal Act. The question is whether this classification between persons whose lands are acquired for housing schemes and persons whose lands are acquired for other public purposes has reasonable relation to the object sought to be achieved. The object of the Amending Act is to acquire lands for housing schemes. It may be, as the learned Counsel contends, the Amending Act was passed to meet an urgent demand and to find a way out to clear up slums, a problem which has been baffling the city authorities for a long number of years, because of want of funds. But the Act as finally evolved is not confined to any such problem. Under the Amending Act land can be acquired for housing schemes whether the object is to clear slums or to improve housing facilities in the city for rich or poor. It may be assumed that in the Madras City the housing problem was rather acute and there was abnormal increase in population and consequent pressure on accommodation, and that there was also an urgent need for providing houses for the middle-income groups and also to slum-dwellers. However laudable the objects underlying the Amending Act may be, it was so framed that under the provisions thereof any lands, big or small, waste or fertile, owned by rich or poor, can be acquired on the ground that it is required for a housing scheme. The housing schemes need not be confined to slum clearance; the wide phraseology used in the Amending Act permits acquisition of land for housing the prosperous section of the community.

It need not necessarily cater to a larger part of the population in the city it can be confined to a chosen few. The land could have been acquired for all the said purposes under the Principal Act after paying the market value of the land. The Amending Act empowers the State to acquire land for housing schemes at a price lower than that the State has to pay if the same was acquired under the Principal Act.

Now what are the differences between persons owning lands in the Madras City or between the lands acquired which have a reasonable relation to the said object? It is suggested that the differences between people owning lands rested on the extent, quality and the suitability of the lands acquired for the said object. The differences based upon the said criteria have no relevance to the object of the Amending Act. To illustrate the extent of the land depends upon the magnitude of the scheme undertaken by the State. A large extent of land may be acquired for a university or for a network of hospitals under the provisions of the Principal Act and also for a housing scheme under the Amending Act. So too, if the housing scheme is a limited one, the land acquired may not be as big as that required for a big university. If waste land is good for a housing scheme under the Amending Act, it will equally be suitable for a hospital or a school for which the said land may be acquired under the Principal Act. Nor the financial position or the number of persons owning the land has any relevance, for in both the cases land can be acquired from rich or poor, from one individual or from a number of persons. Out of adjacent lands of the same quality and value, one may be acquired for a housing scheme under the Amending Act and the other for a hospital under the Principal Act, out of two adjacent plots belonging to the same individual and of the same quality and value one may be acquired under the Principal Act and the other under the Amending Act. From whatever aspect the matter is looked at the alleged differences have no reasonable relation to the object sought to be achieved. It is said that the object of the Amending Act in itself may project the differences in the lands sought to be acquired under the two Acts. This argument puts the cart before the horse. It is one thing to say that the existing differences between persons and properties have a reasonable relation to the object sought to be achieved and it is totally a different thing to say that the object of the Act itself created the differences. Assuming that the said proposition is sound, we cannot discover any differences in the people owning lands or in the lands on the basis of the object. The object is to acquire lands for housing schemes at a low price. For achieving that object, any land falling in any of the said categories can be acquired under the Amending Act. So too for a public purpose any such land can be acquired under the Principal Act. We, therefore, hold that discrimination is writ large on the Amending Act and it cannot be sustained on the principles of reasonable classification.

We therefore hold that the Amending Act clearly infringes Articles 14 of the Constitution and is void.

In this view it is not necessary to express our opinion on the question whether the Amending Act infringes Article 19 of the Constitution.

In the result it is hereby declared that the Amending Act, is void. We direct the issue of writs of *mandamus* restraining the respondents from proceeding with the acquisition under the provisions of the Amending Act. This order will not preclude the respondents from continuing the proceedings under the provisions of the Land Acquisition Act, 1894, in accordance with law. The petitioner in Writ Petition No. 144 of 1963 will get one set of costs, and the petitioner in Writ Petition Nos. 227 and 228 of 1963 will get one set of costs. One hearing fee.

K.S.

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SCOPE OF POWER OF THE WORLD LEGISLATURE.

By

B. P. SRIVASTAVA, B.Sc., LL.M. (LUCKNOW) ; M.C.L. (COLUMBIA).*

The idea of government under law stems from the desire to live in an ordered society—where law and order is the responsibility of the government—where self-help as a mode for solving differences is forbidden—where law creates conditions in which individuals may develop their potentialities. A desire now has arisen among the people of the international community to live in a peaceful World Society and for that purpose to set up a World Government.

Ironically the desire for the World Government is not an outcome of any feeling of universal brotherhood but largely the result of constant fear of a nuclear holocaust. The fear has forced people to cry for peace. Every sensible nation calls for disarmament. Almost with every outbreak of dispute, all energy of the United Nations is pooled towards its peaceful settlement lest it drags in East and West within its fold and may spark a world war leading the entire civilisation to its grave. With such consequences of another war, it is not strange that human race, as a whole, is pleading for world peace. It is not that the peace does not exist today. It does exist if it is taken to mean the absence of war. But the peace, the humanity is crying for, is not the peace which is opposite of war but peace which connotes an orderly society where human happiness and security do not hang by a thread.

No one seriously doubts the utility of the United Nations but its weaknesses are more than noticeable. The potentialities of a nuclear conflict instead of decreasing continue to increase. And if the nuclear powers—the Soviet Union and the United States of America—have not clashed, it is not the U.N. which has prevented the clash, but the balance of power between them. In other words, present day peace is based on the fear of retaliation. But how long this fear will subsist? How long the balance of power can be maintained? What of other nations also on the road to nuclear armament? Will not they upset the balance of power? Above all how long will people remain rational? In the face of these question marks, world extinction can only be postponed but cannot be abrogated.

Thus the problem today is not how best the balance of power can be maintained but how to create a situation where the balance of power is no more necessary. The answer is a World Government. Such a government, unlike the United Nations, would be a government in the real sense of the term possessing not only recommendatory powers as the United Nations has today but also effective executive, legislative and judicial authority—authority to enact laws and authority to enforce it.

In this paper it is intended to discuss the scope of powers of the World Legislature. Since from the very nature of parties and interests involved it is clear that a future World Government can only be a federation, any discussion of the powers of the World Legislature should start with the scheme of distribution of powers between the World Government and its units—the nations.

Scheme of distribution of powers.

In a federal system the States, while retaining their sovereignty, have to carve out a portion of it and surrender it to the Federal Government. That is how the American Federal System was formed at the end of the eighteenth century and other nations, like Canada, Australia and India followed. Likewise in a World Federa-

* Lecturer in law, University of Lucknow, Lucknow, India.

tion the nations will have to give up a portion of their sovereignty in favour of the World Government

One of the basic principles on which a Federal System is based is the division of powers between the Federal Government and the government of the units. This principle is common in all the federations though the scheme of distribution varies. In the United States of America the powers of the Federal Government have been enumerated whereas the residue goes to the States. Australia follows the same pattern. In Canada the scheme adopted in the American Constitution has been reversed. There the powers of the units called Provinces, have been specified. The powers of the Federal Government called Dominion Government, have also been enumerated but it gets the general residue also. In India the distribution resembles that of Canada inasmuch as the powers of both the Federal and State governments have been enumerated and the residue goes to the Federal government but the Indian Constitution goes further and adds another list of powers on which both the governments Federal and States have concurrent powers¹.

From these examples of scheme of distribution of powers between the Federal Government and its units the framers of the World Constitution shall have a choice to make. But the only practicable approach to this problem of distribution is to fall back upon the American model. It is the only approach because in any new federation of this nature limited powers are surrendered to the central authority and that too with a feeling of distrust. This was true in case of the American Federation and this will be more true whenever a World Federation is agreed upon.

Enumeration of legislative powers

After the scheme of distribution is decided the next question follows and that is what subject matters should find place in the enumeration of powers of the World Legislature. There could hardly be any two opinions on the basic principle involved. The principle is that the subject matters of common interest to the member nations should be the concern of the world body. The principle is simple to state but difficult to act upon. The world is full of many cultures and the wide difference between them narrows down the field of common interest. To this may be added the difficulty of drawing a line of demarcation between what is called local interest and an interest which affects more than one nation and thus becomes a common interest. But these difficulties should not prevent us from making a start no matter how narrow the field of common interest is. Once the ball is set rolling and the distrust is replaced by confidence, more and more grounds of common interest will become visible. Justice Douglas writes that there, "are only limited areas where today we can rightly say common ground can be found. Yet they are important, indeed critical ones, and they will expand as the peoples of the world work with their newly emerging institutions of law and gain confidence in them"².

Further in enumerating the subject matters of legislation a distinction is to be made between those subjects which directly or indirectly relate to world peace and subjects which relate to, what may be called, the social welfare and development program. The former will fall under the primary responsibility of the World Government and the World Legislature should have power to enact binding legislation carrying with it sanction, whereas the latter will come under the secondary responsibility of the World Government. In respect of these subjects the World Legislature should enjoy no binding authority.

Subject matters directly relating to world peace

Disarmament —Among the matters which relate to world peace, the first in order of importance is 'disarmament'. No topic in connection with the world

¹ In case of conflict the federal law prevails and the state law to the extent of repugnancy shall be void. Article 254 Constitution of India.

² The Rule of Law in World Affairs p. 30

peace has invited as much debate as 'disarmament'. Various proposals have been made. Since World War II at least three formal attempts have been made and the fourth one is in progress at Geneva to negotiate disarmament—obviously with no material success in the first three and no one is optimistic about the current one. Both the Soviet Union and the Western Block have given out in public utterances their objective to achieve complete disarmament. But the mutual distrust and lack of effective system of inspection have been the main roadblock in reaching any agreed formula. However, recently encouraging developments have taken place in the lessening of tension between the two major powers. The Nuclear Test Ban Treaty which forbids atomic testing in atmosphere and the recent announcement³ both by Premier Khrushchev and President Johnson, followed by Sir Alec Home, of the cutbacks in the production of raw material for atomic weapons, have given hope that mankind may not vanish from earth. These breakthroughs in the stalemate cannot be regarded as the first step towards disarmament which must begin with reduction in nuclear delivery. Nevertheless the signs are hopeful, as President Johnson said: "This is not disarmament. This is not a declaration of peace. But it is hopeful sign and it is a step forward which we welcome and which we can take in hope that the world may yet one day live without the fear of war."³ Premier Khrushchev also declared that he is ready to seek agreement with other nations for "more and more effective measures for strengthening universal peace" and "avoiding a nuclear war."³

In spite of these declarations which may be welcome in the words of Harold Wilson as "psychological step on the road to peace"⁴ the big question still tortures the mind of all, that is, when the slowing down in the arms race will be followed by disarmament. It takes us back to the same basic roadblocks, namely, mutual distrust and lack of effective inspection system. To these may be added the complications created by France and Red China by refusing to sign the test ban treaty and the absence of any announcement by France of atom cut. The one answer—though may not be the only—to the above is a strong World Government.

A democratic World Legislature with reasonable safeguards possibly on the lines suggested by Clark and Sohn⁵ will dispel mutual fears. Though the disarmament plan will be included in the "constitutional legislation", yet the World Legislature should be empowered to enact legislation for its effective implementation. The authority should include the power to deal with any emergency or change of events. The laws enacted may also provide sanctions against violation of the disarmament plan and laws made for its implementation.

Inspection Commission :—The 'constitutional legislation' will also provide for an Inspection Commission and may include provisions relating to its composition, terms and powers. The World Legislature should, however, be empowered to make laws for the effective functioning of the Commission. The authority should include the power to enlarge or curtail the powers of the Commission and also to terminate or extend its term depending upon the exigency of the situation. The Legislature should also possess the power to reconstitute the Commission. The 'constitutional legislation' may require that these extraordinary powers the World Legislature will exercise only by a special majority. This safeguard is necessary to preserve confidence in the Inspection Commission. Another matter which has a connection with the working of the Commission is what assistance and co-operation the Commission might require from the United Nations Nuclear Agency. The Legislature should be able to deal with this matter. It may by law regulate the area and manner of their joint operation.

Rearmament :—Even if universal and complete disarmament is achieved, this will not obviate the possibility of rearmament nor will it preclude war which can

3. 20th April, 1964. Reported N. Y. Times, 21st April, 1964.

4. The Christian Science Monitor, 24th April, 1964, p. 22.

5. World Peace through World Law (2nd Edition), pp. 20-34.

be waged with whatever weapons are left behind "Disarmament would not preclude the eruption of a crisis, war and rearmament could seem imminent"⁶ Here too the necessity arises of effective power in the World Legislature. It should have the power to enact legislation for arms control. It may prescribe by law how much arms a nation should possess. The underlying principle will be how much arms would be necessary to maintain law and order in a particular country. The law should also specify the type of arms the nations might possess. A strict control is a must on the production of arms which should also be regulated by law. The individual nations may produce arms but before they can do it they must notify the World Legislature and obtain its permission. Any violation of arms control legislation should be a matter of grave concern to the World Legislature which may authorise confiscation of any arms produced besides any other penalty it might choose to prescribe.

United Nations Force —Needless to say that there must of necessity be some kind of United Nations Force to police the world against war, rearmament and other violations of the 'constitutional legislation' and laws made thereunder. The establishment of the force would raise a number of questions like how the force is to be raised and in what way and under what circumstances and conditions it will function. The World Legislature should be empowered to deal with all these matters and in particular to make laws for the effective functioning of the force. The Legislature may determine from time to time, what nation or nations would contribute personnel to the United Nations Force. It should also define the circumstances which would require action on the part of the U.N. Force and the measures it might take. On these matters the Legislature may only lay down the broad policy and delegate the power to the main executive to make rules and regulations. In the past the General Assembly did the same thing, for example, in 1956 the General Assembly, while creating the United Nations Emergency Force, empowered the Secretary General "to issue all regulations and instructions which may be essential to the effective functioning" and "to take all other necessary administrative executive action".⁷ Care has, however, be taken to retain control on the delegated power and enabling law may require all rules and regulations made thereunder to be laid before the World Legislature.

Subject matters indirectly relating to world peace

In an international society a disarmed world is not the end. The end is peace. The World Government would be established not only to achieve disarmament but also to create an ordered society. Mere outlawing war is not enough. The World Government must create a World Law to deal with subjects which might be a cause of war. Late President Kennedy in his address to the United Nations Assembly remarked "To destroy arms, however, is not enough. We must create as we destroy, in creating worldwide law and law enforcement as we outlaw world wide war and weapons".⁸ The World Legislature therefore, should have power to enact legislation and thereby create worldwide laws on subjects like high seas, international waterways, air, outer space, bed of high seas and the use of nuclear energy. If the norms of law are set up in advance, the nations as well as individuals may be in a position to predetermine their actions touching these fields. There will be less likelihood of disputes and when they arise the settlement will be possible in accordance with the provisions of law. This will inculcate a feeling of self-control and respect for law, as Prof. Quincy Wright wrote that the "only policy which men have found capable of securing peace in times of crisis is that of rallying behind law and procedures of enforcement which have been prepared in advance."⁹

⁶ Thomas C. Schelling, 'The Role of Deterrence in Total Disarmament—Legal and Political Problems of World Order' (Mendlovitz) p. 632.

⁷ Res. 1001 7th November 1956 General Assembly, 1st Emergency Special Sess on O.R. Supp. No. 1 p. 3.

⁸ 21st September 1961.

⁹ A study of war p. 1330.

High Seas :—The territorial sovereignty of a nation is not confined to the lands but extends to air above its land and to waters touching its coasts. But the distance to which the jurisdiction of a nation extends on the sea has been subject of considerable difference of opinion. There is no law or principle governing the determination of territorial waters. Customarily it extends to three miles from the shore. But nations have never considered themselves bound by this rule of custom. In fact each nation has its own claim as to its territorial waters. Claims from four to two hundred miles have been made. These uncertainties have led and might lead to many disputes particularly in relation to resources in the sea. In 1958 an International Law Commission was set up to deal with this problem and assist in the codification and progressive development of international law. The I.L.C. which met at Geneva was unable to lay down any rule of law prescribing the territorial limits of nations on the sea, but it did adopt four conventions as basic norms on which treaties may be made. The conventions (i) reaffirmed the principle of freedom of the high seas and the air space above them, (ii) provided for arbitration in disputes about fishing and conservation of living resources in the seas, (iii) included a new code for the exploitation of submarine resources on the continental shelf of coastal nations and (iv) recognized national sovereignty over marginal seas adjacent to coastlines with an attempt to define 'innocent passage' through such territorial waters by the ships of other nations.

The adoption of these conventions has revealed two things : First, concern over the subject-matter and second, agreement on the basic principles. Now when a World Government is set up the World Legislature should be empowered to enact binding legislation incorporating the above principles. This will help remove much of the doubts and there will be a law of ocean having force of authority instead of moral principles with no legal sanction.

Most of the disputes in the past related to fishing rights in territorial waters. The question has always been : "Where do territorial waters and exclusive fishing rights stop, and the high seas equally open to all fishermen begin?"¹⁰ The I.L.C. did not answer the question but the World Government must clarify the law. The World Legislature should be empowered to fix by law the territorial limits of nations. Such fixation should, however, be made on the recommendation of a Commission to be set up for the purpose. The Commission would consider the claims of each maritime nation before making its recommendations.

Outside the territorial waters, the seas will be the property of the World Government and open to all. The World Legislature should by law regulate the use of and conduct on the high seas.

International Waterways :—Waterways and harbours at strategic points provide another area of conflict. Troubles with regard to control over and passage through various waterways have not been uncommon. The Suez crisis is an instance of a turmoil which might have led to a world war. The recent conflict between Panama and the U.S.A. is the product of dual control over Panama Canal.

Apart from the question of the possession and control of the strategic straits, the possessor has the right to deny passage to any nation¹¹. An arbitrary denial may spark a trouble.

So it is desirable that the World Legislature should make a law regulating the international traffic through them. An International Administration should be set up to control such waterways and harbours. The right of the possessor to collect tolls may be preserved and so the responsibility of maintenance of the waterway and harbour must rest with the possessor. The device will serve the interest of all. It will protect the economic interest of the nations having possession of the waterways and will also ensure the right of passage through them to every other nation.

10. Arthur N. Holcombe, *The Improvement of the International Law Making Process*, 37 Notre Dame Lawyer, p. 17.

11. U.A.R. does not allow passage to ships having flags of Israel through Suez Canal.

Air space —Until men took to air, nobody talked of sovereignty in air space. But along with the development of aviation, principle of national sovereignty in air space above the land and territorial waters has been affirmed from time to time both at formal conferences and in treaties. The Convention on International Civil Aviation held in 1949 confirmed the principle of exclusive sovereignty in air space and the right of innocent passage by the planes of all nations over the territory of any one¹². The Convention also set up the International Civil Aviation Organisation (ICAO). The ICAO is to deal with agreements in freedom of air trade, aerial collisions, on the liability of air traffic control agencies, on the legal status of the aircraft and on the carriage of nuclear material by air.

But the legal position as it stands today is that a nation may refuse any nation's passage over its territory. With regard to other matters relating to commercial aviation a nation is bound only if it has been party to an agreement or has adopted the regulations if any. In short there is no law which binds all the nations alike. There is a need of such legislation. The World Legislature should be empowered to deal with all matters relating to civil aviation. The ICAO should be given effective power to deal with all cases arising under the civil aviation law. The power to determine whether a nation be given passage over another's territory should also be vested in ICAO. The World Legislature may by law prescribe a procedure to be followed by ICAO which must ensure a right to hearing to parties concerned.

Though no serious trouble has arisen with regard to civil aviation, violations of the air space by military planes have given rise to serious conflicts. A nation whose air space is violated by a military plane does not hesitate in shooting it down and the justification is that the plane was on a reconnaissance flight. And it is difficult to prove that it was not and that the air violation was due to honest navigational error. In any case every incident has a potent tendency to cause a trouble which may lead to a war. Threat to peace is magnified manifold when a nation claims a right to reconnaissance flight over another's territory. The U.S.A. has recently declared publicly its determination to continue reconnaissance flight over Cuba, whereas the latter has asserted its sovereignty in air space and has made it known that it would shoot down any plane found in its air space. The purpose of this paper is not to determine who is right and who is wrong. The problem posed by the respective claims is what would happen in case both are going to follow their declarations to the letters.

In the face of such contingencies the World Government would be the proper authority to deal with reconnaissance flights. The World Legislature should enact legislation as to when and under what circumstances reconnaissance flight may be taken. Such flights would be taken by the International Air Force¹³ and not by individual nations. A nation can file a complaint with such authority as may be prescribed by law and request a reconnaissance.

Outer Space —The second half of the twentieth century has seen a pioneering development in scientific achievements. Men have gone into the space above the atmosphere and come back. What was once a fiction has been translated into reality. The day is not far off when men will land on moon. Along with these developments, new areas of possible international conflicts are also opening—the exploitation of the opportunities which are rapidly opening up in outer space for competitive national enterprise, involves unprecedented cases of international conflict¹⁴. There is thus an apparent need of a law to govern the exploration of outer space.

The General Assembly has already recognised the "common interest of mankind in outer space" and has declared that "outer space should be used for peace

12 The principle was declared by the International Conference on Air Navigation held in Paris in 1910. In 1919 Convention for the Regulation of Air Navigation recognized the exclusive jurisdiction of the nation on the air space above its land and territorial waters.

13 International Air Force would be the air wing of the United Nations Force.

14 Arthur N. Holscombe, 'The Improvement of International Law Making Process' 87 Note Dame Lawyer P. 17.

ful purposes only." In 1958 it set up a Committee to study various problems connected with the space exploration. Again in 1959 a new Committee on the Peaceful Uses of Outer Space was established to make further studies on the subject. In a symposium on "Legal Problems of Space Exploration" held in 1961 the need for an international system in the realm of space was emphasised.¹⁵ In the space exploration there will be need for : adequate tracking, since satellites operate in global orbits which disregard the boundary lines of nations ; practicable methods for allocating frequencies, since the limitation of the radio spectrum is a scientific fact which necessitates agreement between nations ; and rules governing re-entry of space vehicles, since the landing on earth may cause injury and will necessitate determination of liability and further there will be need for the prevention of contamination of celestial bodies.¹⁵ Suggestions have also come forward for joint international launchings and co-operation in space research.

The factors as outlined above would call for general agreement among the nations and if a World Government as contemplated is set up the World Legislature should be empowered to enact laws regulating space exploration for peaceful purposes. A separate United Nations agency may also be established to exercise over-all control in this area²⁰.

Bed of the High Seas :—The natural resources in the bed of high seas and their exploitation would present another area of possible conflicts. The high seas as already discussed will be the property of the World Government and so also the bed of high seas. The World Legislature would therefore have the power to regulate by law the exploration of the bed of high seas.

Nuclear Energy :—Another area which would require an effective control and supervision by the World Government is the use of nuclear energy. The ' constitutional legislation ' would prohibit the use of nuclear energy for war purposes. The World Legislature should be empowered to make appropriate law to enforce the prohibitory provision. It may, however, authorise the peaceful use of nuclear energy under the watchful eyes of a United Nations nuclear energy authority to be established for the purpose. The agency would replace the present International Atomic Energy Agency. It will have control over all the atomic installations throughout the world. The agency should be required to submit periodic reports to the World Legislature.

Special Powers to deal with situations and subjects threatening world peace :—The World Legislature should be armed with power to deal with situations and subject matters, not provided for in the ' constitutional legislation ' but which threaten the world peace. The special power shall be exercised only in extraordinary circumstances and by a special majority. A law, if enacted, under this power should remain in operation only during the period of emergency but not extending a period of two years. Further extension would be possible by fresh legislation following the same special procedure.

The requirement of the special procedure and also the maximum period for which the special law may remain operative should be incorporated in the ' constitutional legislation '.

Subject Matters relating to Social Welfare and Development Program :—The aims of the World Government would go beyond preventing war and keeping peace. It would also deliver goods and work for welfare of the international society and in particular work for the social progress, better economic standards and development of underdeveloped countries. The United Nations is already committed to these ends. One of the aims of the United Nations as stated in the Preamble to the

15. Senate Committee on Aeronautical and Space Sciences, (A Symposium), 87th Congress, Ist Session, March, 1961.

16. Clark and Sohn have proposed a United Nations Outer Space Agency which will work under the direction and control of a United Nations Outer Space Commission. (World Peace through World Law, pp. 296-297.).

Charter is "to promote social progress and better standards of life" and for this end "to employ international machinery for the promotion of the economic and social advancement of all peoples". Further one of the purposes of the United Nations is "to achieve international co-operation in solving problems of an economic, social, cultural or humanitarian character"¹⁷

The specialised agencies of the United Nations have done and are doing good work to achieve these objectives of the United Nations. When the World Government replaces the United Nations it will also assume the responsibility to fulfil the objectives the United Nations was working for. But unlike its predecessor, the World Government would exercise greater control over the specialised agencies¹⁸. These agencies would become responsible to the World Legislature. The Legislature should have the authority to establish such other agencies as it might think necessary. It should be empowered to enact laws within the framework of which the specialised agencies will perform their functions. The authority may also be vested in the Legislature to enact general laws with a view to implementing the social objectives of the World Constitution. The laws so made, as suggested earlier, will not be enforceable against nations or individuals. Nevertheless the agencies will strive to carry the laws into effect and it is hoped the implementation will not suffer because of lack of legal sanction.

One may question the logic behind authorising the World Legislature to undertake social and economic development program without giving power to enforce the plans. The answer is simple. What we need urgently is a World Government which would prevent a world destruction. Nations would readily agree on this and might allow all necessary powers to the World Authority. But they might not agree on giving the same type of authority to the World Government in relation to the social and economic sphere of the nations. To most of them such matters are purely of national interest. The nature of power the World Legislature should possess in these spheres as suggested in this paper presents a compromise between two opposite views.

Crimes against World Government —The provisions of the 'constitutional legislation' laws made thereunder and decisions of the competent authorities may be enforced against a recalcitrant nation by resort to various measures including employment of the United Nations Force.

But since human element will always be involved in any infraction of laws, a provision for enforcement action against nations alone will be no guarantee against violations of laws by private individuals. Law in order to demand obedience must carry with it sanction against individuals. The World Legislature should be empowered to enact a United Nations Penal Code defining acts or omissions of individuals which would constitute crime against the world.

The law may classify such crimes into two main categories, namely, crime against war and crime against peace.

Crime against war —Crime against war will include acts or omissions in violation of laws of war. Though under a World Government war will itself be prohibited, the World Legislature should enact a law of war for any eventuality. The law must declare use of nuclear weapons, poisoned gas and also bacterial warfare as war crimes. In addition it should lay down a code of conduct to be followed during war. Further the law should also make it clear that plea of superior orders will not be valid defence in a trial for war crimes. Incidentally this is the prevailing law. "The rulings of war crimes trials held after World War II and practically

17 Art 1, U.N. Charter

18 International Labour Organisation, Food and Agriculture Organisation, World Health Organisation, United Nations Educational Scientific and Cultural Organisation, International Monetary Fund, International Bank for Reconstruction and Development, International Civil Aviation Organisation, International Finance Corporation, Universal Postal Union, International Telecommunication Union, World Meteorological Organisation, Inter Government Maritime Consultative Organisation, International Trade Organisation, International Atomic Energy Agency

all military codes today affirm the supremacy of international law over domestic law and reject the plea of superior orders as a valid defence in legal proceedings involving infractions of the law of war."¹⁹

Crime against peace.—To define crimes against peace is even more necessary than the crimes against war as it is primarily for keeping peace that the World Government will be set up. The World Legislature should be given power to enact law declaring violations of all laws, made to prevent war and further peace, to be crimes against peace. This will include laws on disarmament, high seas, international waterways, air space, outer space, bed of high seas, nuclear energy and laws made under special powers.

Power relating to 'Bill of Rights'.—The 'constitutional legislation' might also include a chapter on 'Bill of Rights'. It is, however, debatable whether the World Legislature should be given power to enforce the provisions of this chapter. One solution before the makers of the World Constitution would be to divide the area of 'liberties' into two parts, one of which would be enforceable and the other unenforceable.

In the enforceable category should fall the basic human rights like prohibition against slavery, involuntary servitude, trafficking in human beings, forced labour, cruelty and untouchability. The World Legislature should be empowered to enforce the prohibitions by appropriate legislation and its violations may be treated as crimes against humanity. Such practices are already forbidden by law in most of the nations.

Liberties like freedom of speech, person and property and guarantee of equal treatment without regard to race, color and religion, which might be included in the 'Bill of Rights', should come under the category of un-enforceable rights. The World Legislature should have no power to enforce them by law. The declaration of these liberties should be regarded only as 'directive principles' which the nations should strive to achieve. It is so suggested because the basic approach to these liberties varies from system to system. A democratic country like the U.S.A. would like to allow unbridled liberty of speech. Whereas a communist country like Red China would not give any freedom of speech to its people, a few other nations might like to follow a middle course. The argument is equally true in relation to right to property. Discrimination on grounds of race and color is another sore point. The Government of South Africa would not yield to its abolition. Even in the United States the problem is no less easy. Freedom of religion and 'no discrimination on grounds of religion' present another difficulty. In a secular State both are possible and are guaranteed. But discrimination is implicit in a State based on religion and having a State religion.

Under these conditions, no agreement, to confer on the World Legislature a power to enforce the liberties, would be possible. A mere declaration of such rights would be desirable at the present time.

Power relating to 'Finance'.

No organisation much less a World Government can function without finances. A World Government with increased responsibilities will have to perform manifold functions. The United Nations Force, unlike the present practice, will function on a permanent basis and so also many other agencies of the World Body. This will mean more money and greater control on the expenditure than hitherto exercised by the General Assembly.

The World Legislature should have the power to adopt its own annual budget allocating sums to its various instrumentalities. As regards the resources of revenue the present method of assessment per capability may be maintained. In addition the Legislature would be given power to levy taxes and authorise other means to raise money.

19. Guenter Lewy, 'Superior Orders, Nuclear Warfare and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age.' *American Political Science Review*, Vol. 55, No. 1.

The tax may be levied either directly on individuals or else law may require national governments to earmark a certain percentage of tax collected by them for the World Government²⁰. A tax so imposed would not be an additional burden either on the government or on the individuals. When a World Government is set up, every nation can easily afford a substantial cut in its defence budget which would consequently lessen the tax burden on individuals. Out of this saving no one should grumble to pay a part of it in the form of tax—may be as price of peace.

The World Legislature may by law introduce licensing for fishing rights, use of high seas, international air space and outer space. An international postal system taking over international mailing from the national governments would provide additional revenue. The World Government may also enter into business like banking, international air and shipping service. The Legislature should by law regulate their operation.

Conclusion.

The choice before the international society today is between world de traction and world law and only an insane person will opt for the first alternative. A world law is the obvious choice. The world law is possible when an effective World Government is created. Creation of a World Government requires consent of a large majority of nations. Such consent would be forthcoming if the national sovereignty is preserved. One solution is a World Federation composed of all the nations as its units which would retain their national sovereignties. In such a federation the World Legislature should not make a sharp departure from the General Assembly. It needs effective power for keeping peace and that should be allowed to it. So far as possible subject-matters which affect peace should be specifically enumerated. In other spheres which are not concerned with peace, the World Legislature may continue on the path of the General Assembly with necessary modifications. It is on these lines this paper has proceeded. Practicability and acceptability have been the main considerations in its preparation so that establishment of a World Government acceptable to all may be possible.

[END OF VOLUME (1964) II SUPREME COURT JOURNAL].

20. Clark and Sohn have proposed: '.... each member nation would assign in advance to the United Nations all or part of certain taxes designated by it and assessed under its national laws' *World Peace through World Law*, p. xxxviii.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J.,
K. N. Wanchoo, and
K. C. Das Gupta, JJ.
3rd April, 1964.

The Motor Transport Controller,
Maharashtra State v.
Provincial Rashtriya Motor Kamgar
Union, Nagpur.
C.A. No. 742 of 1963.

G. P. and Berar Industrial Disputes Settlement Act 1947, section 31—Reduction—Meaning—Abolition of all posts of establishment—If reduction.

On the question whether the abolition of all posts of an establishment amount to reduction of posts, *Held* :—the word reduction can only be used when something is left after reduction. To speak of abolition as a reduction of the whole thing does not sound sensible or reasonable. We are unable to agree with the High Court that the term "reduction in the number of persons employed or to be employed" as mentioned in Item I of Schedule II covers abolition of all posts. In our opinion, the Government Order in abolishing the posts and terminating the services of the employees did not amount to a change within the meaning of section 31 of the C.P. and Berar Industrial Disputes Settlement Act. The Government was therefore not required to follow the procedure mentioned in section 31.

The decision of the High Court that the proviso is bad is therefore set aside and the question is left open for decision if and when it becomes really necessary to do so. In view of our decision that the High Court erred in thinking that section 31 of the C.P. and Berar Industrial Disputes Settlement Act had to be applied the High Court's order quashing the abolition of posts and the notices of termination cannot be sustained.

S.V. Gupta, Additional Solicitor-General of India (G. B. Pai and R. H. Dhebar, Advocates, with him), for Appellants.

G.R.

Appeal allowed.

[SUPREME COURT.]

K. Subba Rao, K.C. Das Gupta, and
Raghubar Dayal, JJ.
3rd April, 1964.

Smt. Basmati Devi v.
Chamru Sao.
C.A. No. 241 of 1961.

Transfer of Property Act (IV of 1882), section 76—Redemption of usufructuary mortgages—Section 90 of the Trusts Act.

The fact that the mortgagor had made a default, does not alter the position that the mortgagee had also defaulted in paying the rent he was liable to pay. By his default he has contributed to the position that a suit had to be brought for arrears of rent and ultimately to the position that the property was put to sale in execution of the decree obtained in the suit. This contribution to the bringing about of the sale was a direct result of his position as a mortgagee. When therefore he purchased the property himself at the sale in execution of the rent decree he clearly gained an advantage by availing himself of his position as a mortgagee.

This, in our opinion, is the position in law even if the mortgagee's liability was to pay less than the major portion of the rent of the holdings. Whether this would be true even where the portion with the mortgagee is liable to pay is so very small that the property is not ordinarily likely to be brought to sale for that amount, it is unnecessary for us to decide in the present case.

In the present case, the finding is that the liability of the defendants 1 and 2 was to pay a substantial portion of the rent. To say in such circumstances that they did not take advantage of their position as mortgagees is entirely unrealistic. Such a construction would put a premium on dishonesty on the part of mortgagees whenever the entire burden of payment of rent was not left squarely on the mortgagee as under the provision of section 76 of the Transfer of Property Act.

R S Sinha, Senior Advocate (R C Prasad, Advocate, with him) for Appellants
Sarjoo Prasad, Senior Advocate (B P Jha, Advocate, with him) for Respondents Nos 1 and 2

G R

Appeal allowed

[SUPREME COURT]

P B Gajendragadkar C J

A N Wanchoo and

A C Das Gupta JJ

6th April, 1964

The Management of D C Dewan Mohun
 deen Sahib & Sons v

The Secretary, United Beedi Workers
 Union Salem

G A Nos 721 and 791 of 1963

Industrial Disputes Act (XIV of 1947)—Reduction of wages of employees under the agents—Relationship of Master and Servant—Factories Act (LXIII of 1948)—Madras Shops and Establishments Act

It has been found by the tribunal and this view has been confirmed by the appeal Court that the so called independent contractors were mere agents or branch managers of the appellants. We see no reason to disagree with this view taken by the tribunal and confirmed by the appeal Court on the facts of these cases. We are not unmindful in this connection of the view taken by the learned single Judge when he held that on the agreements and the facts found the so called intermediaries were independent contractors. We are however of opinion that the view taken by the appeal Court in this connection is the right one. As the appeal Court has rightly pointed out the so called independent contractors were indigent persons who were in all respects under the control of the appellants. There is in our opinion little doubt that this system has been evolved to avoid regulations under the Factories Act. Further there is also no doubt from whatever terms of agreement and available on the record that the so called independent contractors have really no independence at all. As the appeal Court has pointed out they are impecunious persons who could hardly afford to have factories of their own. Some of them are even ex-employees of the appellants. The contract is practically one sided in that the proprietor can at his choice supply the raw materials or refuse to do so, the so-called contractor having no right to insist upon the supply of raw materials to him. The so-called independent contractor is even bound not to employ more than nine persons in his so called factory. The sale of raw materials to the so called independent contractor and re-sale by him of the manufactured bidis is also a mere camouflage the nature of which is apparent from the fact that the so-called contractor never paid for the materials. All that happens is that when the manufactured bidis are delivered by him to the appellants, amounts due for the so-called sale of raw materials is deducted from the so called price fixed for the bidis. In effect all that happened is that the so-called independent contractor is supplied with tobacco and leaves and is paid certain amounts for the wages of the workers employed and for his own trouble. We can therefore see no difficulty in holding that the so-called contractor is merely an employee or an agent of the appellants as held by the appeal Court and as such employee or agent he employs workers to roll bidis on behalf of the appellants. The work is distributed between a number of so-called independent contractors who are told not to employ more than nine persons at one place to avoid regulations under the Factories Act. We are not however concerned with that aspect of the matter in the present appeals. But there can be no doubt that the workers employed by the so-called contractors are really the workmen of the appellants who are employed through their agents or servants whom they choose to call independent contractors.

V P Raman and R Ganapathy Iyer, Advocates, for Appellant (In C A No 721 of 1963)

G B Pai, Advocate and J B Dadashani, O C Mathur and Ravinder Narain Advocates of M/s J B Dadashani & Co, for Appellant (In C.A No 791 of 1963)

T S Venkataraman, for Respondent No 2 (In both the Appeals)

G R

Appeals dismissed

[SUPREME COURT.]

*M. Hidayatullah and
N. Rajagopala Ayyangar, JJ.*
7th April, 1964.

The State of Gujarat v.
Kansara Manilal Bhikhalal.
Gr.A. No. 5 of 1963.

Factories Act, (LXIII of 1948), sections 2 (m) (i), 60 (1), 63, 117—Protection under for acts done—Conditions for availability.

The language of this protecting clause—Section 117 of the Factories Act is not limited to officers but is made wide to include “any person”. It thus gives protection not only to an officer doing or intending to do something in pursuance or execution of this Act but also to “any person”. But the critical words are “anything done or intended to be done” under the Act. The protection conferred can only be claimed by a person who can plead that he was required to do or omit to do some thing under the Act or that he intended to comply with any of its provisions. It cannot confer immunity in respect of actions which are not done under the Act but are done contrary to it. Even assuming that an act includes an omission as stated in the General Clauses Act, the omission also must be one which is enjoined by the Act. It is not sufficient to say that the act was honest. That would bring it only within the words “good faith”. It is necessary further to establish that what is complained of is something which the Act requires should be done or should be omitted to be done. There must be a compliance or an intended compliance with a provision of the Act, before the protection can be claimed. The section cannot cover a case of a breach or an intended breach of the Act however honest the conduct otherwise.

For these reasons we are of the opinion that the respondent is not saved by section 117. We accordingly, set aside his acquittal and convict him under section 63 read with section 94 of the Factories Act. He is sentenced to pay a fine of Rs. 50 in respect of each of the offences, or in default to undergo 15 days’ simple imprisonment.

D.R. Prem, Senior Advocate, (B.R. G. K. Achar, Advocate, with him), for Appellant.

M. V. Goswami, Advocate, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

*K. Subba Rao, K.C. Das Gupta and
Raghubar Dayal, JJ.*
10th April, 1964.

*Rattan Lal alias Ram Rattan v.
The State of Punjab.*
Gr. A. No. 190 of 1962.

Probation of Offenders Act, (XX of 1958), sections 3, 4, 6 and 11—Scope.

*By Majority :—*Appellate Court in appeal or the High Court, in revision cans in exercise of the power conferred under section 11 of the Probation of Offender. Act, make an order under section 6 (1) thereof, where the appellate Court and the High Court, agreeing with the Magistrate, found the accused guilty of the offences for which he was charged. The calling for a report from the Probation Officer is a condition precedent for the exercise of the power under section 6 (1) of the Act by the Court.

As the Act was recently extended to Gurgzon District, its existence had escaped the attention of the Additional Sessions Judge as well as of the High Court and therefore it was held to be a fit case for our interference under Article 136 of the Constitution.

R. B. Nanak Chand, Advocate, for Appellant.

Gopal Singh, R.N. Sachthey and R. H. Dhebar, Advocates, for Respondent.

G.R.

Appeal allowed and remanded,

[SUPREME COURT]

*M Hidayatullah and
Raghubar Dayal JJ*
14th April, 1964

*Nilratan Sircar v
Lakshmi Narayan Ram Niwas*
Cr A No 83 of 1961

Foreign Exchange Regulation Act (VII of 1947), sections 19 and 4 23, 19 A—Power to detain documents seized

The Magistrate has no jurisdiction over the articles seized in execution of the search warrant issued under section 19 (3) of the Foreign Exchange Regulation Act and he cannot permit the retention of such documents by the Director of Enforcement after the expiry of the period he is entitled to keep them in accordance with the provisions of section 19 A, till final conclusion of proceedings commenced under section 23 of the Act

H R. Khanna K L Hathi and R N Sachthey, Advocates for Appellant

G S Pathak, Senior Advocate, (B Datta, Advocate, and J B Dadachanj, O C Mathur and Ravinder Narain Advocates, with him), for Respondent

G R

Appeal allowed

[SUPREME COURT]

*P B Gajendragadkar, K N Wanchoo,
M Hidayatullah, K C Das Gupta and
N Rajagopala Ayyangar, JJ*
15th April, 1964

*Sant Ram v
Labh Singh*
C A No 299 of 1964

Punjab Custom—Right of Pre-emption—Whether custom is included in "laws in force" in Article 13 of Constitution

There are two compelling reasons why custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force". Firstly to hold otherwise, would restrict the operation of the first clause in such wise that none of the things mentioned in the first definition would be affected by the fundamental rights. Secondly, it is to be seen that the second clause speaks of "laws" made by the State and custom or usage is not made by the State. If the first definition governs only clause (2) then the words "custom or usage" would apply neither to clause (1) nor to clause (2) and this could hardly have been intended. It is obvious that both the definitions control the meaning of the first clause of the Article 130. The argument cannot, therefore, be accepted.

J P Goyal, Advocate, for Appellants

B C Misra, Advocate, for Respondent No 1

G R

Appeal allowed

[SUPREME COURT]

*K Subba Rao, K C Das Gupta, and
Raghubar Dayal JJ*
15th April, 1964

*The State of U P v
Col Sujan Singh*
Cr A No 71 of 1963

Prevention of Corruption Act (II of 1947), section 6 (1) (a)—Sanction of Central Government under section 197, Criminal Procedure Code (V of 1898)—Privilege in respect of certain documents claimed by Central Government—Rules of Allahabad High Court regarding service of notice of despatch of record to the Supreme Court on Advocate of the parties—Article 134 of the Constitution—Condonation of delay in filing appearance and Statement of Case—Final Order under Article 134

By Majority—We find it difficult to hold that the order under appeal is a final order within the meaning of Article 134 of the Constitution. In *Seth Premchand Satramdas v The State of Bihar*, (1950) S C R 799, 804 it was held that an order of the Patna High Court dismissing an application under section 24 (3) of the Bihar Sales Tax Act, 1944 to direct the Board of Revenue, Bihar, to state a

case and to refer it to the High Court was not a "final order." This Court, speaking through Fazl Ali, J., defined the expression "final order" thus :

"It seems to us that the order appealed against in this case, cannot be regarded as a final order, because it does not of its own force bind or affect the rights of the parties."

Assuming that the order decides some right of the Union Government, on which we do not express any opinion, the Union Government is neither a party to the criminal proceedings nor is it a party either before the High Court or before us. The indirect effect of the order on a third party to the proceedings, who does not seek to question that order does not deprive the order of its interlocutory character. We therefore hold that the order made by the High Court is not a final order within the meaning of Article 134 (1) of the Constitution.

S. T. Desai, Senior Advocate (*O. P. Rana, Atiquar Rahman and C. P. Lal* Advocates with him) for Appellant.

C. B. Aggarwala, Senior Advocate, (*Ravinder Narain, O. C. Mathur and J. B. Dadacharji*, Advocates of *M/s. J. B. Dadacharji & Co.* with him) for Respondents Nos. 1 and 2.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C. J.
K. C. Das Gupta, J. J. and
15th April, 1964.

Rupchand Gupta v.
Raghuvanshi (P.) Ltd.
C.A. No. 172 of 1964.

Calcutta Municipal Committee Act—The Calcutta Thika Tenancy Act, 1949—Definition of 'collusion.'

One of the simplest definitions of "collusion" was given by Mr. Justice Bucknill in *Scott v. Scott*, L.R. (1913) P.D. 52. "Collusion may be defined," said the learned Judge "as an improper act done or an improper refraining from doing an act, for a dishonest purpose." Substantially the same idea is expressed in the definition given by Wharton's Law Lexicon, 14th Edition, page 212 viz., "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose." This definition of collusion was approved by this Court in *Nagubai Ammal and others v. B. Shamma Rao and others*, (1956 S.C.R. 451).

S. T. Desai and B. Sen, Senior Advocates (*B. P. Maheshwari*, Advocate, with them), for Appellant.

H. N. Sanyal, Solicitor-General of India (*Ajit Kumar Sen and S. N. Mukerji*, Advocates with him) for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C. J.
K. N. Wanchoo and K. C. Das Gupta, J. J.
15th April, 1964.

Ouseph Poulo v.
The Catholic Union Bank Ltd.
C.As. Nos. 51-52 of 1962.

Contract Act (IX of 1872), section 23—Agreement against public policy for stifling prosecution.

It is well settled that agreements which are made for stifling prosecution are opposed to public policy and as such, they cannot be enforced. The basis for this position is that the consideration which supports such agreement is itself opposed to public policy. In India, this doctrine is not applicable to compoundable offences, nor to offences which are compoundable with the leave of the Court where the agreement in respect of such offence is entered into by the parties with the leave of the Court. With regard to non-compoundable offences, however, the position

is clear that no Court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not for itself. It is obvious that if such a course is allowed to be adopted and agreements made between the parties based solely on the consideration of stifling criminal prosecutions are sustained, the basic purpose of criminal law would be defeated, such agreements may enable the guilty persons to escape punishment and in some others they may conceivably impose an unconscionable burden on an innocent party under the coercive process of a threat of the criminal prosecution. In substance where an agreement of this kind is made it really means that the complainant chooses to decide the fate of the complaint which he has filed in a criminal Court and that is clearly opposed to public policy.

V A Seyid Muhammad Advocate, for Appellants

S T Desai Senior Advocate (A G Pudissery Advocate, with him), for Respondent No. 1

G R

Appeal dismissed

[SUPREME COURT]

P B Gajendragadkar C J A N Wanchoo

Kuldar Singh v

M Hidayatullah K C Das Gupta and

Mukhtiar Singh

N Rajagopala Ayyangar JJ

C A No. 298 of 1964

17th April 1964

Representation of People Act (XLII of 1951), section 123 (3)—Meaning of word 'Panth' in election posters

In fact the High Court does not appear to have considered the different places in the poster where the word "Panth" has been used and no attempt has been made to co-relate these sentences and to inquire whether the meaning attributed by the High Court to the word "Panth" is justified in regard to all the sentences in which that word occurs. It is an elementary rule of construction that the same word cannot have two different meanings in the same document unless the context compels the adoption of such a course. After all the impugned poster was issued in furtherance of the appellant's candidature at an election and the plain object which it has placed before the voters is that the Punjab Suba can be achieved if the appellant is elected, and that necessarily means that the appellant belongs to the Akali Dal Party and the Akali Dal Party is the strong supporter of the Punjab Suba. In these proceedings we are not concerned to consider the propriety, the reasonableness or the desirability of the claim for Punjab Suba. That is a political issue and it is perfectly competent to political parties to hold *bona fide* divergent and conflicting views on such a political issue. The significance of the reference to the Punjab Suba in the impugned poster arises from the fact that it gives a clue to the meaning which the poster intended to assign to the word "Panth". Therefore we are satisfied that the word "Panth" in this poster does not mean Sikh religion, and so, it would not be possible to accept the view that by distributing this poster the appellant appealed to his voters to vote for him because of his religion.

Political issues which form the subject matter of controversies at election meetings may indirectly and incidentally introduce considerations of language or religion but in deciding the question as to whether corrupt practice has been committed under section 123 (3) care must be taken to consider the impugned speech or appeal carefully and always in the light of the relevant political controversy. We are, therefore, satisfied that the High Court was in error in coming to the conclusion that the impugned poster Exhibit P 10 attracted the provisions of section 123 (3) of the Act.

M C Setalvad Senior Advocate (B P Maheshwari, Advocate, with him), for Appellant

Bawa Shri Gharan Singh Advocate and Hardev Singh and Y Kumar, Advocates of Harkum, for Respondent

G R.

Appeal allowed

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo,
M. Hidayatullah, K.C. Das Gupta and
N. Rajagopala Ayyangar, JJ.
21st April, 1964.

Narottamdas v.
The State of M.P.
C.A. No. 221 of 1964.

Madhya Pradesh Minimum Wages Fixation Act, (XVI of 1962)—Minimum Wages Act (XI of 1948)—Article 19 of the Constitution of India (1950).

"We are satisfied however that section 3 of the M.P. Minimum Wages Fixation Act does not make the new rates of wages payable on the 1st January, 1959. The words used are "and it is hereby enacted that the said minimum rates of wages shall be payable by the employer in the said scheduled employments and be enforceable against him with effect from the 1st January, 1959, as if the provisions herein contained have been in force at all material time." By these words, it is urged on behalf of the appellant, the Legislature not only made the minimum wages effective from the 1st January, 1959 but also made them payable on that date for the past period. In other words, the sentence is sought to be read as saying :

"The said minimum rates of wages shall be payable by the employer in the said scheduled employments with effect from 1st January, 1959 and shall be enforceable against him with effect from 1st January, 1959." If that had been the intention of the Legislature the appropriate words to use would have been "the said minimum rates of wages shall be payable by the employer in the said scheduled employments and enforceable against him with effect from 1st January, 1959". No purpose would be served by the word "be" before the word "enforceable" if the phrase "with effect from the 1st January, 1959" was intended to apply both to "payable" and to "enforceable". The very fact that the Legislature took care to say "be enforceable" in the latter part of the sentence shows clearly that, while it was intended that new rates would be enforceable against the employer with effect from the 1st January, 1959 no date was being prescribed by section 3 as the date on which it became payable.

The contention that section 3 and section 4 of the impugned Act impose unreasonable restrictions on the appellant's fundamental rights must therefore be rejected.

M. C. Setalvad, Senior Advocate (B. V. Shukla, Advocate and Ramshwar Nath, S. N. Andley and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with him), for Appellant.

B. Sen, Senior Advocate, (I. N. Shroff, Advocate, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo,
M. Hidayatullah, K.C. Das Gupta and
N. Rajagopala Ayyangar, JJ.
22nd April, 1964.

Gurbux Singh v.
Bhooralal.
C.A.No. 583 of 1961.

Civil Procedure Code (V of 1908), Order 2, Rule 2 (3)—Scope.

In order that a plea of a bar under Order 2, rule 2 (3), Civil Procedure Code should succeed the defendant who raises the plea must make out ; (1) that the suit was in respect of the same cause of action as that on which the previous suit was based ; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief ; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed.

Just as in the case of a plea of *res judicata* which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel,

we consider that a plea under Order 2 rule 2, Civil Procedure Code cannot be made out except on proof of the plaintiff in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaintiff in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averments to justify their grant. From the mere use of the words 'mesne profits' therefore one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profits' has been used in the present plaintiff without a proper appreciation of its significance in law. What matters is not the characterisation of the particular sum demanded but what in substance is the allegations on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. It is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. We therefore consider that the order of remand passed by the learned Additional District Judge which was confirmed by the learned Judge in the High Court was right. The merits of the suit have yet to be tried and this has been directed by the order of remand which we are affirming.

Gopal Singh, Advocate, for Appellant

B. P. Maheshwari, Advocate, for Respondent

G. R.

Appeal dismissed

[SUPREME COURT]

P. B. Gajendragadkar, C. J., K. N. Wanchoo,

M. Hidayatullah, K. C. Das Gupta and

N. Rajagopala Ayyangar, J. J.

24th April, 1964

Bishweshwar Dayal Sinha v.

University of Bihar

Jagat Narain Sharma Interveners

C.A. No. 279 of 1964

Bihar State Universities (Patna University of Bihar, Bagalpur and Ranchi) Act (Bihar Act, XXVIII of 1960)—University of Bihar Act 1951 (XXI of 1951)—Rules of section 2 (4)

The power conferred on the Vice-Chancellor by statute 2 (4) has been exercised by him by not only directing how the Governing Body should be constituted on principle, but by nominating different persons on the Governing Body. The basis on which a Governing Body should be constituted is very different from nominating several persons on the said Governing Body. It is the latter course which has been adopted by the Vice-Chancellor and which is inconsistent with section 30 (4) of the Bihar Act (XXVII of 1960). At this stage, it is necessary to add that the course adopted by the Vice-Chancellor in the present case is also inconsistent with Statute 2 (4) itself. The said statute merely authorises the Vice-Chancellor to amend or revise the constitution of the Governing Bodies of admitted colleges whenever necessary, and even the conferment of this power is *ultra vires* the statute. But what the Vice-Chancellor has done has gone beyond even Statute 2 (4), he has not only amended or revised the constitution of the Governing Body, but has also nominated certain persons on it. Thus, this action of the Vice-Chancellor suffers from the double infirmity that it is inconsistent even with Statute 2 (4) and is purported to have been issued under Statute 2 (4) which itself is invalid. Unfortunately, the High Court appears to have failed to take into account the basic difference between the two categories of collegiate institutions, and the powers conferred on the University severally in respect of them. The view taken by the High Court about the validity of Statute 2 (4) completely obliterates the difference between the two kinds of collegiate institutions and treats all collegiate institutions, whether instituted by the University, or affiliated to it, as

falling completely under the management of the University itself. We accordingly hold that Statute 2 (4) is invalid, and the impugned order passed under it is, therefore, invalid and inoperative.

M. C. Setalvad, Senior Advocate, *R. K. Garg*, *D. P. Singh*, *S. C. Aggarwal* and *M. K. Ramamurthy*, Advocates, of *M/s. Ramamurthy & Co.*, for Appellant.

C. K. Daphtary, Attorney-General for India, (*S. P. Varma*, Advocate with him), for Respondents Nos. 1, 2 and 4.

S. C. Aggarwal, *R. K. Garg*, *D. P. Singh* and *M. K. Ramamurthy*, Advocates of *M/s. Ramamurthy & Co.*, for Respondent No. 5.

Sarjoo Prasad, Senior Advocate, (*S. L. Chhibber* and *B. P. Jha*, Advocates, with him), for Respondent No. 8.

D. Goburdhun, Advocate, for Respondent No. 16.

S. P. Varma, Advocate, for Intervener No. 1.

Dipak Datta Chaudhuri and *A. K. Nag*, Advocates, for Intervener No. 2.

G.R.

Appeal allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., *K. N. Wanchoo*,
M. Hidayatullah, *K. C. Das Gupta* and
N. Rajagopala Ayyangar, JJ.
28th April, 1964.

The Union of India, etc. v.
The Gwalior Ryon Silk Mfg.
(Wvg.) Co., Ltd.
C.As. Nos. 934-935 of 1963.

United State of Gwalior, Indore, Malwa (Madhya Bharat) Regulation of Government Act (1 of 1948)—Articles 295, 278, 372 of the Constitution of India—Part B. State of Madhya Bharat—Effect of Orders of Absolute Rulers—Government of India Act (1935), section 175.

When we are considering whether a particular order of a Ruler continues under Article 372 as a law we cannot forget the jurisprudential distinction between legislative, judicial and executive acts and only those orders of the Ruler which are jurisprudentially legislative acts will continue as laws under Article 372 of the Constitution. Therefore simply because the order dated 18th January, 1947, was passed by an Absolute Ruler it does not necessarily follow that it is law for the purpose of Article 372 and we have to see whether the order can be jurisprudentially said to be a law in order that it may continue as law under Article 372 of the Constitution.

We have no doubt therefore that neither Article 294 nor Article 295 cast any such obligation to the effect that the obligation shall be fulfilled, even though it might not have been binding on the previous Indian State which entered into it and even though the previous State might have the right to affect the contract by legislation provided the law passed was valid. The position in our opinion is the same even after the devolution provided in Articles 294 and 295, and all that these Articles have done is to substitute in place of the previous States or the British Indian Provinces, the Government of India or Part A or Part B States, as the case may be. The devolution of the rights and liabilities prescribed by Article 295 does not involve and is not intended to involve any change in the character of the said rights and liabilities; and so pleas which could have been raised in respect of the said rights and liabilities prior to the devolution remain entirely unaffected. There is therefore no question of any constitutional obligation being cast by the provisions contained in Article 295 (1) (b) on the Government of India to fulfill the contracts irrespective of whether they were binding on the original State which entered into

them and whether they can be affected by law validly passed after the Constitution came into force

C K Daphtary, Attorney General for India (*R Ganpathy Iyer*, and *R H Dhebar* Advocates, with him), for Appellants (In both the Appeals)

M C Setalvad *K A Chitale* and *M K Nambiar*, Senior Advocates, (*Rameshwar Nath* and *S N Andley* Advocates of *M/s Rajender Narain & Co*, with them), for Respondents (In both the Appeals)

G R

Appeal allowed

[SUPREME COURT]

A K Sarkar, *M Hidayatullah*, and
Raghubar Dayal JJ
28th April, 1964

Rammiklal Pitambardas Mehta v
Indradaman Amratlal Sheth
C.A No 61 of 1964

Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947), section 13 (1) (g) (hh)—*Bona fide required by the Landlord—Meaning of 'Premises' and 'Occupies'*

Once the landlord establishes that the *bona fide* requires the premises for his occupations, he is entitled to recover possession of it from tenant in view of the provisions of sub clause (g) of section 13 (1) of Bombay Act LVII of 1947 irrespective of the fact whether he would occupy the premises without making any alteration to them or after making the necessary alteration.

The provisions of clause (hh) cannot possibly apply to the case where a landlord reasonably and *bona fide* requires the premises for his own occupation even if he had to demolish premises and to erect a new building on them. The provisions of clause (hh) apply to cases where the landlord does not require the premises for his own occupation but requires them for erecting a new building which is to be let out to tenants. This is clear from the provisions of sub section (3 A) which provides that a landlord has to give certain undertaking before a decree for eviction can be passed on the ground specified in clause (hh).

'Occupation' of the premises in clause (p) does not necessarily refer to occupation as residence. The owner can occupy a place by making use of it any manner. In a case like the present, if the plaintiffs on getting possession start their work of demolition within the prescribed period, they would have occupied the premises in order to erect a building fit for their occupation.

Purshottam Trikhandas, Senior Advocate, (*M I Patel* and *I N Shroff*, Advocates, with him), for Appellant

S T Desai, Senior Advocate, (*B J Shelat*, Advocate, and *J B Dadachanj*, *O C Mathur* and *Ravinder Narain*, Advocates of *M/s J B Dadachanj & Co*, with him), for Respondent

G R

Appeal dismissed

[SUPREME COURT]

K.A. Wanchoo, *M Hidayatullah*,
K C Das Gupta, and
A Rajagopala Ayyangar, JJ
29th April, 1964.

Jagdish Chandra Gupta v
Kajaria Traders (India) Ltd
C.A No 791 of 1962

Arbitration Act (X of 1940), section 8 and *Civil Procedure Code (V of 1908)*, Order 21, Rule 58—*Meaning of 'Other Proceedings' and "claim of set-off"*

The first question to decide is whether the present proceeding is one to enforce a right arising from the contract of the parties. The proceeding under the Arbitration Act section 8 has its genesis in the arbitration clause, because without an agreement to refer the matter to arbitration that section cannot possibly be invoked. Since the arbitration clause is a part of the agreement constituting the partnership

it is obvious that the proceeding which is before the Court is to enforce right, which arises from a contract. Whether we view the contract between the parties as a whole or view only the clause about arbitration, it is impossible to think that the right to proceed to arbitration is not one of the rights which are founded on the agreement of the parties. The words of section 69 (3) "a right arising from a contract" are in either sense sufficient to cover the present matter.

In our judgment, the words "other proceeding" in sub-section (3) must receive their full meaning untrammelled by the words 'a claim of set-off.' The latter words neither intend nor can be construed to cut down the generality of the words "other proceeding". The sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4).

S. T. Desai, Senior Advocate, (I. N. Shroff, Advocate, with him), for Appellant.

B. C. Misra, Advocate, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., M. Hidayatullah,
K.C. Das Gupta, J.C. Shah, and
Raghubar Dayal, JJ.
4th May, 1964.

Sri C.V.K. Rao v.
Sri Dantu Bhaskara Rao.
C.A. No. 1072 of 1963.

Representation of the People Act (XLIII of 1951), section 7 (d)—Mining Lease—State Governments right of pre-emption under clause 21 of the Covenant.

There is, however, no concluded contract in respect of any goods because it hardly needs to be said that relying upon this clause the lessee cannot begin delivery of the ore to the Government. He can do so only if the Government serves a notice on him stating the quantity pre-empted and the time within which the supply is to be made. The clause, however, does not make it obligatory on Government to pre-empt any quantity of mineral or at all. There is no obligation to buy nor is there any compulsion on the part of the lessee to sell unless asked. In these circumstances, the clause does no more than to keep intact a right of the Government to obtain the minerals or their products as and when Government requires in preference to others. Till Government makes up its mind and serves a notice there is no obligation to make any deliveries and even though the word 'subsists' is a word of wide import, it cannot be said that a contract for the sale of goods subsists because a contract requires an offer and its acceptance and is not a mere reservation of a right.

Taking the most liberal view of the matter it is clear that clause 21 did not bring into being a contract for the supply of goods. All that it did was to reserve to the Government the right to prior purchase of the minerals raised by the respondents. The reservation of such right does not amount to a contract for the supply of goods which can be said to subsist between the parties.

K. R. Chaudhuri, Advocate, for Appellant.

A. V. Vishwanatha Sastri, Senior Advocate, (T. V. R. Talachari, Advocate, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT]

M Hidayatullah, and
N Rajagopala Ayyangar, JJ
5th May, 1964

Union of India v.

Abdul Jalil

Cr A Nos 39 49 of 1962

Forest Act (XVI of 1927) section 26 (1)—Meaning of the Reserve Forest—Part 'C' States (Laws Act 1930)—Merged States (Laws Act, 1949)—Tripura Forest Act of 1257 (T.E.)

The provision in the Indian Forest Act "corresponding" to the Tripura Forest Act (under which the notifications fixing the boundaries of certain forests were issued) is as regards 'a protected forest' under Chapter IV and not a "reserved forest" within section 20 contained in Chapter II

C K Daphary, Attorney General for India (D N Mukherjee and R H Dhebar, Advocates with him), for Appellant (In all the Appeals).

P K Chatterjee, Advocate, for Respondents (In Appeals Nos 39, 42, 43, 46, 48 and 49 of 1962)

G R.

Appeals dismissed

[SUPREME COURT]

P.B. Jagendragadkar, C J, M Hidayatullah,
K C Das Gupta, J C Shah, and
Raghubar Dayal, JJ
8th May, 1964

Poona City Municipal Corpn v

D N Deodhar

F P Shah Intervener

GA No 582 of 1961

Bombay District Municipal Act (III of 1901)—Bombay Municipal Boroughs Act of 1925—Bombay Provincial Municipal Corporation Act, 1949

A tax on octroi refund is not one of the taxes which the Bombay Municipal Corporation could impose. It is not one of the specified taxes. Nor is it a tax which the State Legislature has power under the Constitution to impose in the State. Apart from this absence of power to impose such a tax, which is clear from the earlier parts of section 127, we have the categorical prohibition in sub section (4) against the imposition of any such tax by the Corporation.

We also agree with the High Court's conclusion that the plaintiff was entitled to bring the present suit. The Poona City Municipality's Octroi Rules and By-laws under which the claim for refund can be made define "a claimant" as a person who produces the duly receipted import bill and the corresponding export certificates (Rule 2, Cl (g)). It is not disputed that for the several cases in respect of which this deduction of ten per cent had been made by the Corporation the plaintiff was the person who produced "the duly receipted import bill and the corresponding export certificate". Indeed, it is on that basis that 90 per cent of the amount paid by different exporters was refunded by the Corporation to the claimant. It is difficult to understand how if the plaintiff was entitled to claim and obtain refund in respect of 90 per cent of the amount paid, he was not entitled to make the claim with respect to the remaining 10 per cent.

S G Patwardhan, Senior Advocate, (S B Tarkunde, Advocate and J B Dada chary, O C Mathur and Ravinder Narain, Advocates of M/s J B Dadachary & Co with him), for Appellant

A V Vishwanatha Sastri, Senior Advocate, (M R Kotwal and Navnit Lal, Advocates, with him), for Intervener

G R.

Appeal dismissed

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., M. Hidayatullah,
K.C. Das Gupta, J.C. Shah, and
Raghubar Dayal, J.J.
8th May, 1964.

Murarilal v. Dev. Karan
C.A. No. 484 of 1961.

Rajasthan—Mortgage—Transfer of Property Act (IV of 1880) not applicable—Equitable doctrine of Mortgagors equity of redemption inspite of a clog created on such equity by stipulation in the mortgage deed.

The equitable principle of justice, equity and good conscience has been consistently applied by Civil Courts in dealing with mortgages in a substantial part of Rajasthan and that lends support to the contention of the respondent that it was recognised even in Alwar that if a mortgage deed contains a stipulation which unreasonably restrains or restricts the mortgagor's equity of redemption Courts were empowered to ignore that stipulation and enforce the mortgagor's right to redeem, subject of course, to the general law of limitation prescribed in that behalf. We are, therefore, satisfied that no case has been made out by the appellant to justify our interference with the conclusion of the Rajasthan High Court that the relevant stipulation on which the appellant relies ought to be enforced even though it creates a clog on the equity of redemption.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., M. Hidayatullah,
J. C. Shah, Raghubar Dayal, and
S.M. Sikri, J.J.
8th May, 1964.

Sri Jagadguru Kari Basava Rajen-
daraswami of Govi Mutt v.
Commr. of H.R. and C.E.
C.A. No. 745 of 1963.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951)—Scope—Articles 13 and 19 of the Constitution.

Section 62 (3) (a) of Madras Act (XIX of 1951) specifically provides that any scheme for the administration of a religious institution settled or modified by the Court in a suit under sub-section (1) or on an appeal under sub-section (2) or any scheme deemed under section 103, clause (d), to have been settled or modified by the Court may, at any time, be modified or cancelled by the Court on an application made to it by the Commissioner, the trustee or any person having interest. This provision clearly brings out the fact that if a scheme governed by section 103 (d) is deemed to have been made or sanctioned under the provisions of the latter Act and thus continued, modifications in it can be effected by adopting the procedure prescribed by section 62 (3). In other words, a scheme like the present is automatically continued by operation of section 103 (d), but is liable to be modified if appropriate steps are taken in that behalf under section 62 (3). Reading section 103 (d) and section 62 (3) together, it seems to us that Mr. Sastri's argument that the consistency of the scheme with the relevant provisions of the latter Act should be examined in writ proceedings, cannot be entertained. In fact, unless modifications are made in the scheme under section 62 (3) the scheme as a whole will be deemed to have been made under the latter Act and will be enforced as a valid scheme. That clearly is the purpose of section 103 (d). Therefore, we do not think we are called upon to consider the further contentions raised by Mr. Sastri that some of the clauses in the scheme are inconsistent with the provisions of the latter Act.

A. V. Vishwanatha Sastri, Senior Advocate, (K. Rajendra Chaudhuri and K. R. Chaudhuri, Advocates, with him), for Appellant.

R. Ganapathy Iyer, and B. R. G. K. Achar, Advocates for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT]

K. Subba Rao N. Rajagopala Ayyangar,
and J.R. Mudholkar, JJ
8th May 1964

Shivagoud Rayji Patil v
G. Neelkanth Sadalge
C.A. No. 244 of 1964

*Partnership Act (IX of 1932) section 30 (5)—Provincial Insolvency Act, (V of 1920)—
Minor as partner*

When the partnership itself was dissolved before the first respondent became a major, it is legally impossible to hold that he had become a partner of the dissolved firm by reason of his inaction after he became a major within the time prescribed under section 30 (5) of the Partnership Act. Section 30 of the said Act presupposes the existence of a partnership. Sub-sections (1) (2) and (3) thereof describe the rights and liabilities of a minor admitted to the benefits of partnership in respect of acts committed by the partners, sub-section (4) thereof imposes a disability on the minor to sue the partners for an account or payment of his share of the property or profits of the firm save when severing his connection with the firm. This sub-section also assumes the existence of a firm from which the minor seeks to sever his connection by filing a suit. It is implicit in the terms of sub-section (5) of section 30 of the Partnership Act that the partnership is in existence. A minor after attaining majority cannot elect to become a partner of a firm which ceased to exist. The notice issued by him also determines his position as regards the firm. Sub-section (7) which describes the rights and liabilities of a person who exercises his option under sub-section (5) to become a partner also indicates that he is inducted from that date as a partner of an existing firm with co-equal rights and liabilities along with other partners. The entire scheme of section 30 of the Partnership Act posits the existence of a firm and negatives any theory of its application to a stage when the firm ceased to exist. One cannot become or remain a partner of a firm that does not exist.

G. S. Pathak, Senior Advocate (R. Gopalakrishnan, Advocate, with him), for Appellants

S. G. Patwardan, Senior Advocate (V. Kumar and Naumit Lal, Advocates, with him), for Respondent No. 1

G. R.

Appeal dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Tilkayat Shri Govindlalji Maharaj, etc.

.. Appellants*

v.

The State of Rajasthan and others

.. Respondents.

Nathdwara Temple Act (Rajasthan Act XIII of 1959)—Provisions of—Constitutional validity—Nathdwara temple—Whether public or private temple—Tilkayat—If has any right of ownership over property.

Constitution of India (1950), Articles 19 (1) (f), 31 (2), 25 and 26—If violated.

Neither the tenets nor the religious practices of the Vallabha School necessarily postulate that the followers of the school must worship in a private temple. Some temples of this cult may have been private in the past and some of them may be private even to-day. Whether or not a particular temple is a public temple must necessarily be considered in the light of the relevant facts relating to it. There can be no general rule that a public temple is prohibited in Vallabha School. The finding of the High Court that Shrinathji temple at Nathdwara is a public temple cannot be challenged on this ground.

The Firman issued by the Udaipur Darbar in 1934 conclusively shows that the Shrinathji Temple at Nathdwara is undoubtedly a public temple. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. The Firman is a law by which the affairs of the Nathdwara Temple and succession to the office of the Tilkayat were governed after its issue. A Hindu Ruler as an absolute monarch was the fountain head of all legislative, executive and judicial powers and he could supervise and control the administration of public charity and religious endowments. By the Firman the Tilkayat was held to be no more than the Custodian, Manager and Trustee of the property belonging to the said temple. It is on the basis of this law the vires of the Nathdwara Temple Act (XIII of 1959) must inevitably be determined.

The challenge to the validity of the Act on the basis that the Act has interfered with the Tilkayat's rights of ownership over his private property cannot succeed. The rights such as the Tilkayat possesses as Custodian and Manager or Trustee cannot attract Article 19 (1) (f) or Article 31 (2) of the Constitution of India. Such rights as the Tilkayat has have not been affected by the Act.

If the temple is a public temple and the Legislature thought that it was essential to safeguard the interests of the temple by taking legislative action in that behalf, it is difficult to appreciate how the Tilkayat can seriously contend that in passing the Act, the Legislature has been guilty of unconstitutional discrimination.

The right of the Tilkayat to manage the property or the right to create a lease of the property of the temple or the right to alienate the property of the temple under the supervision of the Darbar cannot be equated with the totality of the powers possessed by the Mahant or Shebait. The rights which can legitimately be claimed by the Tilkayat does not amount to a right to property under Article 19 (1) (f) or constitute property under Article 31 (2) of the Constitution.

Even if it was held that these rights constituted a right to hold property their regulation by the relevant provisions of the Act would undoubtedly be protected by Article 19 (5) of the Constitution. The restrictions must therefore be treated as reasonable and in the interests of the general public.

Even if it is assumed that the rights claimed by the Tilkayat constitute property under Article 31 (2), substituting for a Tilkayat a new Board including in it the Tilkayat for administration of the properties of the temple cannot be regarded as "compulsory acquisition" of the Tilkayat's rights.

Assuming that the denomination has a beneficial interest in the properties of the temple, (the denomination only supported the case of the Tilkayat that the temple was a private temple) what is protected under Articles 25 (1) and 26 (b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the Statute is essentially and absolutely secular in character it cannot be urged that Article 25 (1) or Article 26 (b) has been contravened. Article 26 (d) provides that though the denomination has the right to administer the property it must administer the property in accordance with "law" (which means law passed by competent Legislature). This clause emphatically brings out the competence of the Legislature to make a law in regard to the administration of the property, belonging to the denomination.

Sections 3, 4, 16, 22 and 34 of the Act are valid because the scheme envisaged by the said sections clearly protects the religious rites, ceremonies and services rendered in the temple and the Tilkayat's status and powers in respect thereof.

Section 2 (viii) defining a temple as including the temple of Shri Navanit Priyaji and Shri Madan Mohanlalji is valid as the two subsidiary idols had been transferred by the Tilkayat to the principal temple.

*C.As. Nos. 652 to 656, 757 and 758 of 1962 and

21st January, 1963.

Writ Petition No. 74 of 1962.

The Proviso to section 5 (2) (g) making the Collector a statutory member of the Board even though he may not be a Hindu and may not belong to the denomination is valid and proper. It is consistent with the State's right of supervision over the management of the temple properties as specified in the Firman of 1934.

Sections 5, 7 and 11 are valid.

Section 10 providing for *ad hoc* management in the interval between dissolution of one Board and constitution of another and the transitional provision of section 35 cannot be challenged.

"Affairs of temple" in section 16 refer only to secular matters and cannot be struck down on the ground that it did not require the management to be in accordance with the customs and usages of the denomination.

Section 21 giving to the Board complete power of appointment, suspension, removal, dismissal or imposition of any other punishment on the officers and servants of the temple or the Board is valid.

Section 27 under which a power of inspection may be conferred by the State Government on any person (even a non Hindu) is intended to safeguard the proper administration of the properties of the temple and nothing more. The section does not suffer from any constitutional infirmity.

Section 28 (2) and (3) dealing with the application of surplus funds is not open to challenge.

The first part of section 30 (2) (a) empowering the State Government to make Rules in respect of the qualifications for holding the office of Goswami is invalid but the second part giving power to make Rules for the allowances payable to the Goswami are valid.

Section 36 empowering Government to give directions in carrying out the objects of the Act in case a difficulty arises in giving effect to the provisions of the Act cannot be struck down as conferring far too sweeping powers on Government.

Section 37 provides for a bar to any suits or proceedings against the State Government for things done or purported to be done by it under the provisions of the Act. It cannot impinge on the right of a citizen to file a suit under section 31 if it is shown that the citizen is interested within the meaning of section 31 (1). The validity of section 37 must therefore be upheld.

Appeals from the Judgment and Order dated the 31st January, 1962 of the Rajasthan High Court in D B Civil Writ Petitions Nos 90 and 310 of 1959 and 421 of 1960 and Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

M C Setalvad, Attorney-General for India, *G S Pathak*, Senior Advocate, (*B B Desai*, Advocate, High Court, *V A Seyid Muhammed* and *B C Misra*, Advocates, with them), for Appellant (In C.A. No 652 of 1962) and Respondent No 1 (In C.A.s Nos 653 and 757 of 1962).

C K Daphlary, Solicitor-General of India, *G C Kashwal*, Advocate General for the State of Rajasthan and *M M Tiwari*, Senior Advocate (*S K Kapur*, *B R. L. Jengar*, *Kan Singh*, *V N Sethi*, *B R. G K Achar* and *P D Menon*, Advocates, with them), for Respondents Nos 1 and 2 (In C.A.s Nos 652 and 656 of 1962) and Respondent No 1 (In C.A. No 654 of 1962), Respondents Nos 2 and 3 (In C.A. No 757 of 1962), Respondent No 11 (In C.A. No 758 of 1962) and Appellants (In C.A. Nos 653 and 655 of 1962).

Sarjoo Prasad, Senior Advocate (*S B L Saxena* and *K K Jain*, Advocates, with him), for Respondents Nos 3 to 5 (In C.A. No 652 of 1962), Respondents Nos 2 to 4 (In C.A. No 653 of 1962), Respondents Nos 2, 3, 5, 6 and 7 (In C.A. No 654 of 1962), the Board and its members (In C.A. No 655 of 1962), Respondents Nos 3 to 12 (In C.A. No 656 of 1962) and the Appellants (In C.A. Nos 757 and 758 of 1962).

A V Viswanatha Sastri, Senior Advocate (*Bal Krishna Acharya* and *M V Goswami*, Advocates, with him), for Appellants (In C.A. No 654 of 1962), Respondents Nos 1 to 10 (In C.A. No 655 of 1962) and Respondents Nos 1 to 10 (In C.A. No 758 of 1962).

P K Chakravarty, Advocate, for Appellant (In C.A. No 656 of 1962).

G S Pathak, Senior Advocate (*B Datta*, Advocate, High Court and *B P Maheshwari*, Advocate, with him), for Petitioner (In W.P. No 74 of 1962).

C K Daphlary, Solicitor-General of India, *G C Kashwal*, Advocate General for the State of Rajasthan and *M M Tiwari*, Senior Advocate (*S K Kapur*, *B R.*

L. Iyengar, Kan Singh, V. N. Sethi and P. D. Menon, Advocates, with them), for Respondents Nos. 1 and 2 (In W.P. No. 74 of 1962).

Sarjoo Prasad, Senior Advocate (*S. B. L. Saxena and K. K. Jain*, Advocates, with him), for Respondents Nos. 3 to 12 (In W.P. No. 74 of 1962).

The Judgment of the Court was delivered by

Gajendragadkar, J.—This group of seven cross-appeals arises from three writ petitions filed in the High Court of Judicature for Rajasthan, in which the validity of the Nathdwara Temple Act, 1959 (XIII of 1959) (hereinafter called the Act) has been challenged. The principal writ petition was Writ-Petition No. 90 of 1959; it was filed by the present Tilkayat Govindlalji (hereinafter called the Tilkayat) on 28th February, 1959. That Petition challenged the validity of the Nathdwara Ordinance, 1959 (II of 1959) which had been issued on 6th February, 1959. Subsequently this Ordinance was repealed by the Act which, after receiving the assent of the President, came into force on 28th March, 1959. Thereafter, the Tilkayat was allowed to amend his petition and after its amendment, the petition challenged the vires of the Act the provisions of which are identical with the provisions of its predecessor Ordinance. Along with this petition, Writ Petition No. 310 of 1959 was filed on 17th August, 1959 by ten petitioners who purported to act on behalf of the followers of the Pushtimargiya Vaishnava Sampradaya. This petition attacked the validity of the Act on behalf of the Denomination of the followers of Vallabha. On 3rd November, 1960 the third Writ Petition (No. 421 of 1960) was filed on behalf of Goswami Shri Ghanshyamlalji who, as a direct descendant of Vallabha, set up an interest in himself in regard to the Nathdwara Temple, and as a person having interest in the said Temple, he challenged the validity of the Act. These three petitions were heard together by the High Court and have been dealt with by a common judgment. In substance, the High Court has upheld the validity of the Act, but it has struck down as *ultra vires* a part of the definition of 'temple' in section 2 (viii); a part of section 16 which refers to the affairs of the temple; section 28 sub-sections (2) and (3); section 30 (2) (a); sections 36 and 37. The petitioners as well as the State of Rajasthan felt aggrieved by this decision and that has given rise to the present cross-appeals. The Tilkayat has filed Appeal No. 652 of 1962, whereas the State has filed appeals Nos. 653 and 757 of 1960. These appeals arise from Writ Petition No. 90 of 1959. The Denomination has filed Appeal No. 654 of 1962, whereas the State has filed Appeals Nos. 655 and 758 of 1962. These appeals arise from Writ Petition No. 310 of 1959. Ghanshyamlalji whose Writ Petition No. 421 of 1960 has been dismissed by the High Court on the ground that it raises disputed questions of fact which cannot be tried under Article 226 of the Constitution, has preferred Appeal No. 656 of 1962. Since Ghanshyamlalji's petition has been dismissed *in limine* on the ground just indicated, it was unnecessary for the State to prefer any cross-appeal. Besides these seven appeals, in the present group has been included Writ Petition No. 74 of 1962 filed by the Tilkayat in this Court under Article 32. By the said writ petition the Tilkayat has challenged the vires of the Act on some additional grounds. That is how the principal point which arises for our decision in this group is in regard to the constitutional validity of the Act.

At this stage, it is relevant to indicate broadly the contentions raised by the parties before the High Court and the conclusions of the High Court on the points in controversy. The Tilkayat contended that the idol of Shri Shrinathji in the Nathdwara Temple and all the property pertaining to it were his private properties and as such, the State Legislature was not competent to pass the Act. In the alternative, it was urged that even if the Nathdwara Temple is held to be a public temple and the Tilkayat the Mahant or Shebait in charge of it, as such Mahant or Shebait he had a beneficial interest in the office of the high priest as well as the properties of the temple and it is on that footing that the validity of the Act was challenged under Article 19 (1) (f) of the Constitution. Incidentally the argument for the Tilkayat was that the idols of Shri Navnit Priyaji and Shri Madan Mohanlalji were his

private idols and the property pertaining to them was in any case not the property in which the public could be said to be interested. The Denomination substantially supported the Tilkayat's case. In addition, it urged that if the temple was held to be a public temple, then the Act would be invalid because it contravened the fundamental rights guaranteed to the Denomination under Article 25 (1) and Article 26 (b) and (c) of the Constitution. Ghanshyamlalji pleaded title in himself and challenged the validity of the Act on the ground that it contravened his rights under Article 19 (1) (f).

On the other hand, the State of Rajasthan urged that the Nathdwara Temple was a public temple and the Tilkayat was no more and no better than its Manager. As such, he had no substantial beneficial interest in the property of the temple. The contention that the Tilkayat's fundamental rights under Article 19 (1) (f) have been contravened by the Act was denied; and the plea of the Denomination that the fundamental rights guaranteed to it under Articles 25 (1) and 26 (b) and (c) had been infringed was also disputed. It was urged that the law was perfectly valid and did no more than regulate the administration of the property of the temple as contemplated by Article 26 (d) of the Constitution. The Tilkayat's claim that the two idols of Navnit Priyaji and Madan Mohanlalji were his private idols was also challenged. Against Ghanshyamlalji's petition, it was urged that it raised several disputed questions of fact which could not be appropriately tried in proceedings under Article 226.

The High Court has upheld the plea raised by the State against the competence of Ghanshyamlalji's petition. We ought to add that the State had contended that the Tilkayat's case about the character of the temple was also a mixed question of fact and law and so, it could not be properly tried in writ proceedings. The High Court, however, held that it would be inexpedient to adopt a technical attitude in this matter and it allowed the merits of the dispute to be tried before it on the assurance given by the learned Counsel appearing for the Tilkayat that the character of the property should be dealt with on the documentary evidence adduced by him. Considering the documentary evidence, the High Court came to the conclusion that the temple is a public temple. It examined the several Firmans and Sanads on which reliance was placed by the Tilkayat and it thought that the said grants supported the plea of the State that the temple was not the private temple of the Tilkayat. It has, however, found that the Tilkayat is a spiritual head of the Denomination as well as the spiritual head of the temple of Shrinathji. He alone is entitled to perform 'Seva' and the other religious functions of the temple. In its opinion, the two minor idols of Navnit Priyaji and Madan Mohanlalji were the private idols of the Tilkayat and so, that part of the definition which included them within the temple of Shrinathji was struck down as invalid. In this connection, the High Court has very strongly relied on the Firman issued by the Maharana of Udaipur on 31st December, 1934 and it has observed that this Firman clearly established the fact that the temple was a public temple, that the Tilkayat was no more than a Custodian, Manager and Trustee of the property belonging to the temple and that the State had the absolute right to supervise that the property dedicated to the shrine was used for legitimate purposes of the shrine. Having found that the Tilkayat was the head of the Denomination and the head priest of the temple, the High Court conceded in his favour the right of residence, the right to distribute Prasad and the right to conduct or supervise the worship and the performance of the Seva in the temple. In the light of these rights, the High Court held that the Tilkayat had a beneficial interest in the properties of the temple and as such, was entitled to contend that the said rights were protected under Article 19 (1) (f) and could not be contravened by the Legislature. The High Court then examined the relevant provisions of the Act and held that, on the whole, the major operative provisions of the Act did not contravene the fundamental rights of the Tilkayat under Article 19 (1) (f); section 16, section 28 sub-sections (2) and (3), section 30 (2) (d), sections 36 and 37, however, did contravene the Tilkayat's fundamental rights according to the High Court, and so, the said sections and the part of the

definition of 'temple' in section 2 (viii) were struck down by the High Court as *ultra vires*. The plea that the fundamental rights under Article 25 (1) and Article 26 (b) and (c) were contravened did not appeal to the High Court to be well-founded. In the result, the substantial part of the Act has been held to be valid. It appears that before the High Court a plea was raised by the Tilkayat that his rights under Articles 14 and 31 (2), had been contravened by the Act. These pleas have been rejected by the High Court and they have been more particularly and specifically urged before us by the Tilkayat in his Writ Petition No. 74 of 1962. That, in brief, is the nature of the findings recorded by the High Court in the three writ petitions filed before it.

Before dealing with the merits of the present dispute, it is necessary to set out briefly the historical background of the temple of Shrinathji at Nathdwara and the incidents in relation to the management of its properties which ultimately led to the Act. The Temple of Shrinathji at Nathdwara holds a very high place among the Hindu Temples in this country and is looked upon with great reverence by the Hindus in general and the Vaishnava followers of Vallabha in particular. As in the case of other ancient revered Hindu temples, so in the case of the Shrinathji Temple at Nathdwara, mythology has woven an attractive web about the genesis of its construction at Nathdwara. Part of it may be history and part may be fiction, but the story is handed down from generation to generation of devotees and is believed by all of them to be true. This temple is visited by thousands of Hindu devotees in general and by the followers of the Pushtimargiya Vaishnava Sampradaya in particular. The followers of Vallabha who constitute a Denomination are popularly known as such. The Denomination was founded by Vallabha (1479-1531 A.D.)*. He was the son of Tailanga Brahmin named Lakshmana Bhatt. On one occasion, Lakshmana Bhatt had gone on pilgrimage to Banaras with his wife Elamagara. On the way, she gave birth to a son in 1479 A.D. That son was known as Vallabha. It is said that God Gopala Krishna manifested himself to Vallabha on the Govardhana Hill by the name of Devadamana, also known as Shrinathji. Vallabha saw the vision in his dream and he was commanded by God Gopala Krishna to erect a shrine for Him and to propagate amongst his followers the cult of worshipping Him in order to obtain salvation¹. Vallabha then went to the hill and he found the image corresponding to the vision which he had seen in this dream. Soon thereafter, he got a small temple built at Giriraj and installed the image in the said temple. It is believed that this happened in 1500 A.D. A devotee named Ramdas Chowdhri was entrusted with the task of serving in the temple. Later on, a rich merchant named Pooranmall was asked by Govardhanathji to build a big temple for him. The building of the temple took as many as 20 years and when it was completed, the image was installed there by Vallabha himself and he engaged Bengali Brahmins as priests in the said temple².

In course of time Vallabha was succeeded by his son Vithalnathji who was both in learning and in saintly character a worthy son of a worthy father. Vithalnath had great organising capacity and his work was actuated by missionary zeal. In the Denomination Vallabha is described as Acharya or Maha Prabhuji and Vithalnath is described as Gosain or Goswamin. It is said that Vithalnath removed the idol of Shrinathji to another temple which had been built by him. It is not known whether any idol was installed in the earlier temple. Vithalnath lived during the period of Akbar when the political atmosphere in the country in Northern India was actuated by a spirit of tolerance. It appears that Akbar heard about the saintly reputation of Vithalnath and issued a Firman granting land in Mowza of Jatipura to Vithalnathji in order to build buildings, gardens, cowsheds and workshops for the temple of Govardhanathji. This Firman was issued in 1593 A.D. Later, Emperor Shahajahan also issued another Firman on 2nd October, 1633

* Some scholars think that Vallabha was born in 1473 A.D., *vide* The Cultural Heritage of India, Vol. III at page 347.

& Minor Religious Systems' at page 77.

2. Bhai Manilal C. Parekh's "A Religion of Grace".

1. Bhandarkar on 'Vaishnavism, Saivism

which shows that some land was being granted by the Emperor for the use and expenses of Thakurdwar exempt from payment of dues

Goswami Vithalnath had seven sons. The tradition of the Denomination believes that besides the idol of Shrinathji, Vithalnathji, received from his father seven other idols which were also "Swarroops" (manifestations) of Lord Krishna. Before his death, Vithalnathji entrusted the principal idol of Shrinathji to his eldest son Girdharji and the other idols were given over to each one of his other sons. These brothers in turn founded separate shrines at various places which are also held by the members of the Denomination in high esteem and reverence.

When Aurangzeb came on the throne, the genial atmosphere of tolerance disappeared and the Hindu temples were exposed to risk and danger of Aurangzeb's intolerant and bigoted activities. Col Todd in the first Volume of his 'Annals of Rajasthan' at page 451 says that

"when Aurangzeb proscribed Kanaya and rendered his shrines impure throughout Vrij Rana Raj Singh offered the heads of one hundred thousand Rajpoots for his service, and the god was conducted by the route of Kotah and Rampoor to Mewar. An omen decided the spot of his future residence. As he journeyed to gain the capital of the Sessodias the chariot wheel sunk deep into the earth and defied extrication, upon which the Sookuni (augur) interpreted the pleasure of the deity that he desired to dwell there. This circumstance occurred at an inconsiderable village called Siarh in the fief of Dailwara, one of the sixteen nobles of Mewar. Rejoiced at this decided manifestation of favour, the Chief hastened to make a perpetual gift of the village and its lands which was speedily confirmed by the patent of the Rana. Nathji (the god) was removed from his car, and in due time a temple was erected for his reception, when the hamlet of Siarh became the town of Nathdwara. This happened about 1671 A.D."

This according to the tradition, is the genesis of the construction of the temple at Nathdwara. Since then, the religious reputation of the temple has grown by leaps and bounds and to-day it can legitimately claim to be one of the few leading religious temples of the Hindus. Several grants were made and thousands of devotees visiting the temple in reverence made offerings to the temple almost every day throughout the year. No wonder that the temple has now become one of the richest religious institutions in the country.

The succession to the Gaddi of the Tilkayat has, from the beginning, been governed by the rule of primogeniture. This succession received recognition from the Rulers of Mewar from time to time. It appears that in 1813 A.D. Tilkayat Govindlalji was adopted by the widow of Tilkayat Damodarji and the Ruler of Mewar recognised the said adoption. Later, the relations between the Ruler of Mewar and the Tilkayat were strained during the time of Tilkayat Girdharlalji. It seems that the Tilkayat was not content with the position of a spiritual leader of the Denomination, but he began to claim special secular rights, and when the Darbar of Udaipur placed the villages belonging to the Nathdwara Temple under attachment, a protest was made by the members of the Denomination on behalf of the Tilkayat. It was as a result of this strained relationship between the Darbar and the Tilkayat that in 1876 Tilkayat Girdharlalji was deposed and was deported from Nathdwara by the order passed by the Rana of Mewar on 8th May, 1876. The reason given for this drastic step was that the Tilkayat disobeyed the orders of the ruling authority and so, could not be allowed to function as such. In place of the deposed Tilkayat, his son Goverdhanlalji was appointed as Tilkayat Girdharlalji then went to Bombay and litigation started between him and his Tilkayat son in respect of extensive properties in Bombay. Girdharlalji claimed the properties as his own whereas his Tilkayat son urged that the fact that Girdharlalji had been deposed by the Rana of Udaipur showed that the properties no longer vested in him. It appears that the Bombay High Court consistently took the view that the order passed by the Rana of Udaipur on the 8th of May, 1876 was an act of a foreign State and did not affect his right to property in Bombay. It was observed that Girdharlalji was regarded as owner of the property, he had not lost his right as such to the said property in consequence of his deposition, and if he was merely a trustee, he had not been removed from his office by any competent Tribunal vide *Nanabhai & others v*

Shriman Goswami Girdharji¹, Goswami Shri Girdharji Maharaj Shri Govindraiiji Maharaj Tilkait v. Mudhowdas Premi and Goswami Shri Gowardhanlalji Girdharji Maharaj², and Shriman Goswami (Shri 108 Shri Gowardhanlalji Girdharlalji v. Goswami Shri Girdharlalji Govindraiiji³. So far as the Nathdwara temple and the properties situated in Mewar were concerned, the Tilkayat Goverdhanlalji who had been appointed by the Rana of Udaipur continued to be in possession and management of the same.

Unfortunately, in 1933, another occasion arose when the Rana of Udaipur had to take drastic action. After the death of Goverdhanlalji on 21st September, 1933, his grandson Damodarlalji became the Tilkayat. His conduct, however, showed that he did not deserve to be a spiritual leader of the Denomination and could not be left in charge of the religious affairs of the Shrinathji Temple at Nathdwara. That is why on 10th October, 1933, he was deposed and his son Govindlalji the present Tilkayat, was appointed the Tilkayat of the temple. Before adopting this course, the Rana had given ample opportunities to Damodarlalji to improve his conduct, but despite the promises made by him Damodarlalji persisted in the course of behaviour which he had adopted and so, the Darbar was left with no other alternative but to depose him. That is how the present Tilkayat's regime began even during the lifetime of his father.

As on the occasion of the deposition of Girdharlalji in 1833, so on the occasion of the deposition of Damodarlalji, litigation followed in respect of Bombay properties. On the 6th January, 1934, Damodarlalji filed a suit in the Bombay High Court (No. 23 of 1934) against the Tilkayat and other persons representing the Denomination. In this suit, he claimed a declaration that he was entitled to, and had become the owner of, all the properties mentioned in the plaint and that he was the owner of all the rights, presents, offerings, and emoluments arising in and accruing from the ownership of the idols, Shrinathji. and Shri Navnit Priyaji as well as his position as the Tilkayat Maharaj in due course of his succession. In the said suit, the idols of Shrinathji and Shri Navnit Priyaji were added as defendants. At that time, the Tilkayat was a minor. Written statements were filed on his behalf and on behalf of the two idols. A counter-claim was preferred on behalf of the idols that the properties belonged to them. Subsequently, the suit filed by Damodarlalji was withdrawn; but the counter-claim made by the idols was referred to the sole arbitration and final determination of Sir Chimanlal H. Setalvad, a leading Advocate of the Bombay High Court. On 10th April, 1942, the arbitrator made his award and in due course, a decree was passed in terms of the said award on 8th September, 1942. This decree provided that all the properties, movable and immovable, and all offerings and bhents donated to the idol of Shrinathji or for its worship or benefit belonged to the said idol, whereas properties donated, dedicated or offered to the Tilkayat Maharaj for the time being, or at the Krishna Bhandar Pedhis if donated, dedicated or offered for the worship or benefit of the idol belonged to the idol. It also provided that the Tilkayat Maharaj for the time being in actual charge at Nathdwara is entitled to hold, use and manage the "properties of the said idol according to the usage of the Vallabhi Sampradaya". The said award and the decree which followed in terms of it were naturally confined to the properties in the territories which then comprised British India and did not include any properties in the territories which then formed part of British India or Native States as they were then known.

Meanwhile, after Damodarlalji was deposed and his son Govindlalji was appointed the Tilkayat, the Rana of Udaipur issued a Firman on 31st December, 1934. By this Firman it was laid down that the shrine of Shrinathji had always been and was a religious institution for the followers of the Vaishnavas Sampradaya and all the properties offered at the shrine were the property of the shrine and that the Tilkayat Maharaj was merely a Custodian, Manager and Trustee of the said property for the shrine. It also provided that the Udaipur Darbar had absolute right

1. (1888) I.L.R. 12 Bom. 331.
2. (1893) I.L.R. 17 Bom. 600.

3. (1878) I.L.R. 17 Bom. 620.

to supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine. It also made certain other provisions to which we shall have occasion to return later.

When he was appointed the Tilkayat, Govindlalji was a minor and so, the management of the temple and the property remained with the Court of Wards till 1st April, 1948. On that date the management of the Court of Wards was withdrawn and the charge of the property was handed over to the Tilkayat. It appears, that the management of affairs by the Tilkayat was not very happy or successful and the estate faced financial difficulties. In order to meet this difficult situation the Tilkayat appointed a committee of management consisting of 12 members belonging to the Denomination some time in 1952. This was followed by another committee of 21 members appointed on 11th June, 1953. Whilst this latter committee was in charge of the management, some valuables stored and locked in the room in the premises of the Temple of Shrinathji were removed by the Tilkayat in December, 1957. This news created excitement amongst the members of the public in general and the followers of the Denomination in particular, and so, the Rajasthan Government appointed a Commission of Enquiry. In the preamble to the notification by which the Commission of Enquiry was appointed, it was stated that the State of Rajasthan as the successor of the Covenanted State of Mewar had a special responsibility to supervise that the endowments and properties dedicated to the shrine are safeguarded and used for the legitimate purposes of the shrine. The Commission of Enquiry made its report on the 11th October, 1959. This report passed severe strictures against the conduct of the Tilkayat. At this stage, we ought to add that the dispute between the Tilkayat and the Rajasthan Government as to the ownership of the valuable articles removed from the temple was later referred to the sole arbitration of Mr. Mahajan, the retired Chief Justice of this Court. The arbitrator made his award on 12th September, 1961, and held that except in regard to the items specified by him in his award, the rest of the property belonged to the Tilkayat, and he found that when the Tilkayat removed the properties, he believed that they were his personal properties.

It was in the background of these events that the State of Rajasthan thought it necessary that a scheme should be drafted for the management of the Temple and this proposal received the approval of the Tilkayat. In order to give effect to this proposal, it was agreed between the parties that a suit under section 92, Civil Procedure Code, should be filed in the Court of the District Judge at Udaipur. The parties then thought that the suit would be non-contentious and would speedily end in a scheme of management being drafted with the consent of parties. Accordingly, Suit No. 1 of 1956 was filed in the District Court at Udaipur, and in accordance with the agreement which he had reached with the authorities the Tilkayat filed a non-contentious written statement. However, before the suit could make any appreciable progress, Ghanshyamlalji and Baba Rajvi the son of the Tilkayat applied to be made parties to the suit and it became clear that these added parties desired to raise contentions in the suit and that entirely changed the complexion of the litigation. It was then obvious that the litigation would be a long-drawn out affair and the object of evolving a satisfactory scheme for the management of the affairs of the temple would not be achieved until the litigation went through a protracted course.

It was under these circumstances that the Governor of Rajasthan promulgated an Ordinance called the Nathdwara Ordinance, 1959 (II of 1959) on 6th February, 1959. The Tilkayat immediately filed his Writ Petition No. 90 of 1959 challenging the validity of the said Ordinance. The Ordinance was in due course replaced by Act XIII of 1959 and the Tilkayat was allowed to amend his original writ petition so as to challenge the vires of the Act. Shortly stated, this is the historical background of the present dispute.

The first question which calls for our decision is whether the tenets of the Vallabha Denomination and its religious practices postulate and require that the

worship by the devotees should be performed at the private temple owned and managed by the Tilkayat, and so, the existence of public temples is inconsistent with the said tenets and practices. In support of this argument, the learned Attorney-General has placed strong reliance on the observations made by Dr. Bhandarkar in his work on Vaisnavism, Saivism and Minor Religious Systems page 80. In the section dealing with Vallabha and his school, the learned Doctor has incidentally observed that the Gurus of this sect ordinarily called Maharajs are descendants of the seven sons of Vithalesa. Each Guru has a temple of his own, and there are no public places of worship. He has also added that the influence exercised by Vallabha and his successors over their adherents is kept up by the fact that the God cannot be worshipped independently in a public place of worship, but in the house and temple of the Guru or the Maharaj which, therefore has to be regularly visited by the devotees with offerings. These temples are generally described as Havelis and the argument is that the said description also brings out the fact that the temples are private temples owned by the Tilkayat of the day. It is true that the observations made by Dr. Bhandarkar lend support to the contention raised before us by the learned Attorney-General on behalf of the Tilkayat, but if the discussion contained in Dr. Bhandarkar's work in the section dealing with Vallabha is considered as a whole, it would be clear that these observations are incidental and cannot be taken to indicate the learned Doctor's conclusions after a careful examination of all the relevant considerations bearing on the point. Since, however, these observations are in favour of the plea raised by the Tilkayat, it is necessary very briefly to enquire whether there is anything in the tenets or the religious practices of this denomination which justifies the claim made by the learned Attorney-General.

What then is the nature of the philosophical doctrines of Vallabh? According to Dr. Radhakrishnan,¹ Vallabha accepts the authority not only of the Upanishads, the Bhagvad-gita and the Brahma Sutra, but also the Bhagvata Purana. In his works, Anubhasya, Siddhantarahasya and Bhagavata-Tikasubodhini, he offers a theistic interpretation of the Vedanta, which differs from those of Sankara and Ramanuja. His view is called Suddhadvaita, or pure non-dualism, and declares that the whole world is real and is subtly Brahman. The individual souls and the inanimate world are in essence one with Brahman. Vallabha looks upon God as the whole and the individual as part. The analogy of sparks of fire is employed by him to great purpose. The Jiva bound by maya cannot attain salvation except through the grace of God, which is called Pushti. Bhakti is the chief means of salvation, though Jnana is also useful. As regards the fruit of Bhakti, there are diverse opinions, says Dasgupta². Vallabha has said in his Sevaphala-vivrti that as a result of it one may attain a great power of experiencing the nature of God, or may also have the experience of continual contact with God, and also may have a body befitting the service of God. Vallabha, however, is opposed to renunciation after the manner of monistic sanyasa, for this can only bring repentance, as being inefficacious. Thus, it will be seen that though Vallabha in his philosophical theories differs from Sankara and Ramanuja, the ultimate path for salvation which he has emphasised is that of Bhakti and by Bhakti the devotee obtains Pushti (divine grace). That is why the cult of Vallabha is known as Pushtimarg or the path for obtaining divine grace.

Dr. Bhandarkar points out that according to Vallabha, Mahapushti, or the highest grace, is that which removes great obstacles and conduces to the attainment of God himself. This Pushtibhakti is of four kinds : (1) Pravaha-Pustibhakti, (2) Maryada-Pustibhakti, (3) Pusti-Pustibhakti and (4) Sudha-Pustibhakti. The first is the path of those who while engaged in a worldly life with its me and mine, do acts calculated to bring about the attainment of God. The second is of those who, withdrawing their minds from worldly enjoyments, devote themselves to God by hearing His praise and listening to discourses about Him. The third is of those

1. "Indian Philosophy" by Dr. Radhakrishnan, pages 756 and 758.

2. "A History on Indian Philosophy" by Dasgupta, pages 355-356.

who already enjoyed God's grace and are made competent to acquire knowledge useful for adoration and thus come to know all about the ways of God. The fourth is of those who through mere love devote themselves to the singing and praising of God as if it were a haunting passion. Thus, it would be seen that the tenets of the cult emphasised the importance of Bhakti, and the religious practices accordingly centered round this doctrine of Bhakti.

The practical modes of worship adopted by the members of this cult bring out the same effect. Lord Krishna as a child is the main object of worship. His worship consists of several acts of performance every day in the prescribed order of ceremonies. These begin with the ringing of the bell in the morning and putting the Lord to bed at night. After the Lord is awakened by the ringing of the bell, there is a blowing of the conch shell, awakening of the Lord and offering morning refreshments, waving of lamps, bathing, dressing, food, leading the cows out for grazing, the mid-day meal, waving of lamps again, the evening service, the evening meal and going to bed. These rituals performed with meticulous care from day to day constitute the prescribed items of Seva which the devotees attend every day in the Vallabh Temple. In order to be able to offer Bhakti in a proper way the members of this denomination are initiated into this cult by the performance of two rites, one is Sharana Mantropradesh and the other is Atma Nivedan. The first gives the devotee the status of a Vaishnava and the second confers upon him the status of an Adhikari entitled to pursue the path of service or devotion. At the performance of the first rite, the mantra which is repeated in the ears of the devotee is 'Shree Krishna Sharanam Mamah' and on the occasion a 'tulsi Kanthi' is put around the neck of the devotee. At the second initiation, a religious formula is repeated, the effect of which is that the devotee treats himself and all his properties as belonging to Lord Krishna. We have already referred to the original image which Vallabha installed in the temple built in his time and the seven idols which Vithalnathji gave to his sons. These idols are technically described as 'Nidhi Swaroops'. Besides these idols, there are several other idols which are worshipped by Vaishnava devotees after they are sanctified by the Guru. It is thus clear that believing in the paramount importance and efficacy of Bhakti, the followers of Vallabha attend the worship and services of the Nidhi Swaroops of idols from day to day in the belief that such devotional conduct would ultimately lead to their salvation.

It is significant that this denomination does not recognise the existence of Sadhus or Swamis other than the descendants of Vallabha and it emphasises that it is unnecessary to adopt ritualistic practices or to repeat Sanskrit Mantras or incantations in worshipping the idols. Besides, another significant feature of this cult is that it does not believe in celibacy and does not regard that giving up worldly pleasures and the ordinary mode of a house-holders' life are essential for spiritual progress. In fact Vallabha himself lived a house holder's life and so have all his descendants. This cult does not, therefore, glorify poverty and it teaches its followers that a normal house-holders' life is quite compatible with the practice of Bhakti, provided of course, the devotee goes through the two ceremonies of initiation and lives up to the principles enunciated by Vallabha.

The question which we have to decide is whether there is anything in the philosophical doctrines or tenets or religious practices which are the special features of the Vallabha school, which prohibits the existence of public temples or worship in them. The main object underlying the requirement that devotees should assemble in the Haveli of the Guru and worship the idol obviously was to encourage collective and congregational prayers. Presumably it was realised by Vallabha and his descendants that worship in Hindu public temples is apt to clothe the images worshipped with a formal and rigid character and the element of personality is thereby obliterated, and this school believes that in order that Bhakti should be genuine and passionate, in the mind of the devotee there must be present the necessary element of the personality of God. It is true that Vaishnava temples of the Vallabha

sect are generally described as Havelis and though they are grand and majestic inside, the outside appearance is always attempted to resemble that of a private house. This feature can, however, be easily explained if we recall the fact that during the time when Vithalnathji with his great missionary zeal spread the doctrine of Vallabha, Hindu temples were constantly faced with the danger of attack from Aurangzeb. In fact, the traditional story about the foundation of the Srinathji Temple at Nathdwara itself eloquently brings out the fact that owing to the religious persecution practised during Aurangzeb's time, Srinathji himself had to give up his abode near Mathura and to start on a journey in search of a place for residence in more hospitable and congenial surroundings. Faced with this immediate problem Vithalnathji may have started building the temples in the form of Havelis so that from outside nobody should know that there is a temple within.

It may also be true historically that when the first temple was built in the life time of Vallabha it may have been a modest house where the original image was installed and during the early years just a few devotees may have been visiting the said temple. Appropriately enough, it was then called a Haveli. Later, even when the number of devotees increased and the temples built by the Vallabha sect began to collect thousands of visitors, traditional adherence to time-honoured words described all subsequent temples also as Havelis however big and majestic they were. Therefore, we are satisfied that neither the tenets nor the religious practices of the Vallabha school necessarily postulate that the followers of the school must worship in a private temple. Some temples of this cult may have been private in the past and some of them may be private even today. Whether or not a particular temple is a public temple must necessarily be considered in the light of the relevant facts relating to it. There can be no general rule that a public temple is prohibited in Vallabha School. Therefore, the first argument urged by the learned Attorney-General in challenging the finding of the High Court that the Srinathji temple at Nathdwara is a public temple, cannot be accepted.

The question as to whether a Hindu temple is private or public has often been considered by judicial decisions. A temple belonging to a family which is a private temple is not unknown to Hindu law. In the case of a private temple it is also not unlikely that the religious reputation of the founder may be of such a high order that the private temple founded by him may attract devotees in large numbers and the mere fact that a large number of devotees are allowed to worship in the temple would not necessarily make the private temple a public temple. On the other hand, a public temple can be built by subscriptions raised by the public and a deity installed to enable all the members of the public to offer worship. In such a case, the temple would clearly be a public temple. Where evidence in regard to the foundation of the temple is not clearly available, sometimes, judicial decisions rely on certain other facts which are treated as relevant. Is the temple built in such an imposing manner that it may *prima facie* appear to be a public temple? The appearance of the temple of course cannot be a decisive factor; at best it may be a relevant factor. Are the members of the public entitled to any entry in the temple? Are they entitled to take part in offering service and taking Darshan in the temple? Are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple? Are their offerings accepted as a matter of right? The participation of the member of the public in the Darshan in the temple and in the daily acts of worship or in the celebrations of festival occasions may be a very important factor to consider in determining, the character of the temple. In the present proceedings, no such evidence has been led and it is, therefore, not shown that admission to the temple is controlled or regulated or that there are other factors present which indicate clearly that the temple is a private temple. Therefore, the case for the Tilkayat cannot rest on any such considerations which, if proved, may have helped to establish either that the temple is private or is public.

There are, however, certain ancient documents which show that the temple cannot be a private temple. We have already referred to the Firmans issued by

Akbar and Shah Jahan These Firmans are strictly not material for the purpose of the present dispute because they have no relation to the temple at Nathdwara. However, as a matter of history, it may be worthwhile to recall that the Firman issued by Akbar on 31st May, 1593 A.D. shows that Vithalrai had represented to the Darbar that he had purchased on paying its price land from the owners thereof in the Mowzah of Jatipura, situated in the Parganah, adjoining Gordhan and had caused to be built thereon buildings, gardens, cowsheds and Karkhanas (workshops) for the temple of Gordhan Nath, and that he was residing there. Having received this representation, Akbar issued an order that the above mentioned Mowzah had been given over tax free into the possession of the above-mentioned Goswami from descendant to descendant. It would thus be seen that though the grant by which the land in question was exempted from payment of taxes is in the name of the Goswami, there can be no doubt that it was so named on the representation made by the Goswami that he had purchased the land and built structures on it for the temple of Gordhan Nath. Thus, in substance, the grant was made to the Goswami who was managing the temple of Gordhan Nath. The grant of Shah Jahan made in 1633 A.D. is to the same effect. These grants are in reference to the temple built by Vithalraj in Jatipura. We have already seen that the idol of Shrinathji was removed from the said temple and brought to Nathdwara in about 1671.

The earliest document in regard to Siarh is of the year 1672 A.D. This document has been issued by the Rana of Udaipur and it says that—

“Be it known that Shrinathji residing at Sihod Let uncultivated land as may desire be cultivated till such time. When Shrinathji goes back to Briy the land of those to whom it belongs will be returned to them. If any one obstructs in any way he will be rebuked.”

The next document is of 1680 A.D. It has been issued by Rana of Udaipur and is in similar terms. It says that—

“When Shrinathji goes back to Briy from Singhad Brahmins will get the land which is of the Brahmins. They will get the land as is entered in previous records. So long as Shrinathji stays here no Brahmin shall cultivate towards the West of Shah Jagivan's wall upto and across the foot of the hillock. If any one cultivates a fine of Rs. 225 shall be realised collectively.”

Fortunately, for Nathdwara, the temple which was then built for Shrinathji for a temporary abode has turned out to be Shrinathji's permanent place of residence. These two documents clearly show that after Shrinathji was installed in what is now known as Nathdwara, the land occupied for the purpose of the temple was given over for that purpose and the actual occupants and cultivators were told that they would get the land back when Shrinathji goes back to Briy.

We have already cited the extract from Col Toodd's ‘Annals of Rajasthan’ in which he has graphically described the traditional belief in regard to the choice of Siarh for the abode of Shrinathji. That extract shows that as soon as the chariot wheel of Shrinathji stopped and would not move, the Chief hastened to make a perpetual gift of the village and its lands which was speedily confirmed by the patent of the Rana. Nathji was removed from his car and in due course of time a temple was erected for his reception. That is how the hamlet of Siarh became the town of Nathdwara. This assurance given by the Chief was confirmed by the two grants to which we have just referred. Thus, there can be no doubt that the original grants were for the purpose of the temple.

A deed of dedication executed by Maharana Shri Bhim Singhji in favour of Gusainji in Sambat 1865 also shows that the lands therein described had been dedicated to Shriji and Shri Gusainji and that all the income relating to those lands would be dedicated to the Bhandar of Shriji.

A letter written by the Maharana on 17th January, 1825 speaks to the same effect. “Our ancestors,” says the letter—

“kept the Thakurji Maharaj and the Gosainji Maharaj at the village of Shunhad which is near Udaipur and presented that village to the Thakurji. After this, our ancestors became followers of that religion and agreed to obey orders. They all granted lands and villages for the expenses of the God. Besides these certain lands were granted for the grazing of the cows belonging to the Thakurji.”

This letter contains certain orders to the officers of the State to respect the rights of the temple and Gosainji.

Consistently with this record, we find a declaration made by Tilkayat Gordhanji in 1932 in which he stated that :

" the money of Shri Thakurji as is the practice now that it is not spent in our private expenditure, same will be followed ",

though along with this declaration he added that the proprietary right was his own from the time of the ancestors. In conformity with the same, the entry will continue as usual in the accounts of credit and debit as is the continuing mutation. Even though the Tilkayat set up the claim that the temple was private, it is consistently adhered to that the income derived from the properties of the temple is not intended to be and has never been used for the personal requirements of the Tilkayat.

It is true that there are other grants which have been produced on the record by the Tilkayat for the purpose of showing that some gifts of immovable property were made in favour of the Tilkayat. Such grants may either show that the gifts were made to the Tilkayat because he was in the management of the temple, or they may have been made to the Tilkayat in his personal character. Grants falling in the former category would constitute the property of the temple, whilst those falling in the latter category would constitute the private property of the Tilkayat. These grants, however, would not affect the nature of the initial grants made to the temple soon after Shrinathji came to Nathdwara. Therefore in our opinion, having regard to the documentary evidence adduced in the present proceedings, it would be unreasonable to contend that the temple was built by the Tilkayat of the day as his private temple and that it still continues to have the character of a private temple. From outside it no doubt has the appearance of a Haveli, but it is common ground that the majestic structure inside is consistent with the dignity of the idol and with the character of the temple as a public temple.

We have referred to these aspects of the matter because they were elaborately argued before us by the learned Attorney-General. But as we will presently point out, the Firman issued by the Udaipur Darbar in 1934 really concludes the controversy between the parties on these points and it shows that the Shrinathji Temple at Nathdwara is undoubtedly a public temple. It is, therefore, now necessary to consider this Firman. This Firman consists of four clauses. The first clause declares that according to the law of Udaipur, the shrine of Shrinathji has always been and is a religious institution for the followers of the Vaishnava Sampradaya and that all the property immovable and movable dedicated, offered or presented to or otherwise coming to the Deity Shrinathji has always been and is the property of the shrine and that the Tilkayat Maharaj for the time being is merely a Custodian, Manager and Trustee of the said property for the shrine of Shri Nathji and that the Udaipur Darbar has absolute right to supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine. The second clause deals with the question of succession and it provides that the law of Udaipur has always been and is that the succession to the Gaddi of Tilkayat Maharaj is regulated by the law of primogeniture, and it adds that the Udaipur Darbar has the absolute right to depose any Tilkayat Maharaj for the time being if in its absolute discretion such Maharaj is considered unfit and also for the same reason and in the same way to disqualify any person who would otherwise have succeeded to the Gaddi according to the law of primogeniture. The third clause provides that in case the Tilkayat Maharaj is a minor, the Darbar always had and has absolute authority to take any measures for the management of the shrine and its properties during such minority. The last clause adds that in accordance with the said law of Udaipur, the Rana had declared Shri Damodarlalji unfit to occupy the Gaddi and had approved of the succession of Goswami Govindlalji to the Gaddi of Tilkayat Maharaj, and it ends with the statement that the order issued in that behalf on 10th October, 1933, was issued under his authority and is lawful and in accordance with the law of Udaipur.

In appreciating the effect of this Firman, it is first necessary to decide whether the Firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur, it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. This position is covered by decisions of this Court and it has not been disputed before us, vide *Madhaurao Phalke v The State of Madhya Bharat*¹, *Ammer un Nissa Begum & Ors v Mahboob Begum & Ors*² and *Director of Endowments, Government of Hyderabad & Others v Akram Ali*³.

It is true that in dealing with the effect of this Firman, the learned Attorney-General sought to raise before us a novel point that under Hindu law even an absolute monarch was not competent to make law affecting religious endowments and their administration. He suggested that he was in a position to rely upon the opinions of scholars which tended to show that a Hindu monarch was competent only to administer the law as prescribed by Smritis and the oath which he was expected to take at the time of his coronation enjoined him to obey the Smritis and to see that their injunctions were obeyed by his subjects. We did not allow the learned Attorney-General to develop this point because we hold that this novel point cannot be accepted in view of the well recognised principles of jurisprudence. An absolute monarch was the fountain head of all legislative executive and judicial powers and it is of the very essence of sovereignty which vested in him that he could supervise and control the administration of public charity. In our opinion, there is no doubt whatever that this universal principle in regard to the scope of the powers inherently vesting in sovereignty applies as much to Hindu monarchs as to any other absolute monarch. Therefore, it must be held that the Firman issued by the Maharana of Udaipur in 1934 is a law by which the affairs of the Nathdwara Temple and succession to the office of the Tilkayat were governed after its issue.

Then the learned Attorney General contended that in judging about the effect of this Firman we should not ignore the background of events which necessitated its issue. Damodarlalji had been deposed by the Maharana and it was more in anger that the Firman was issued to meet the challenge of the said incident. Damodarlalji had filed certain suits in the Bombay High Court and it appeared as if a doubt would arise in the minds of the followers and devotees of the temple as to whether the deposition of Damodarlalji was valid or not. It was with a view to meet this specific particular situation that the Firman was issued and so it need not be treated as a law binding for all times. In our opinion, this argument is clearly misconceived. Whatever may be the genesis of the Firman and whatever may be the nature of the mischief which it was intended to redress, the words used in the Firman are clear and as provisions contained in a statute they must be given full effect. There can be little doubt that after this Firman was issued, it would not be open to anyone to contend that the Srinathji temple was a private temple belonging to the Tilkayat Maharaj of the day. This law declares that it has always been and would always be a public temple. The validity of this law was not then and is not now open to any challenge when it seeks to declare that the temple in question has always been a public temple. We have already seen that the original grants amply bear out the recital in clause 1 of the Firman about the character of this temple. The Firman then clearly provides that the Tilkayat Maharaj is merely a Custodian Manager and Trustee of the said property and that finally determines the nature of the office held by the Tilkayat Maharaj. He can claim no better and no higher rights after the Firman was issued. The said clause also declares that the Darbar has absolute right to see to it that the property is used for legitimate purpose of the shrine. This again is an assertion which is validly made to assert the sovereign⁴

1 (1951) 2 S.C.J. 477 (1961) 1 S.C.R. 957

2 A.I.R. 1955 S.C. 332

3 A.I.R. 1956 S.C. 60

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rights to supervise the administration of public charity. Clause 2 lays down the absolute right of the Darbar to depose the Tilkayat and to disqualify anyone from claiming the succession to the Gaddi. It shows that succession to the Gaddi and continuing in the office of the Tilkayat are wholly dependent on the discretion of the Darbar. The Right of the Darbar to depose the Tilkayat and to recognise a successor or not is described by this clause as absolute. The third and the fourth clauses are consistent with the first two clauses. Reading this Firman as a whole there can be no doubt that under the law of Udaipur, this temple was held to be a public temple and the Tilkayat was held to be no more than the Custodian, Manager and Trustee of the property belonging to the said temple. It is on the basis of this law that the vires of the Act must inevitably be determined.

The learned Attorney-General has invited our attention to some decisions in which the temples of this cult were held to be private temples. We would now very briefly refer to these decisions before we proceed to deal with the other points raised in the present appeals. In *Gossamee Sree Greedhareejee v. Rumanlolljee Gossamee*¹, the Privy Council held that when the worship of a Thakoor has been founded under Hindu Law, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or that there has been some usage, course of dealing, or circumstances to show a different mode of devolution. Greedhareejee who as the plaintiff appeared before the Privy Council as the appellant had been deposed by the Rana of Udaipur in 1876. He claimed the rights of shebaitship of a certain consecrated idol and as incident thereto to the things which had been offered to the idol. This claim was based on the allegation that by rule of primogeniture he had preferential right and not his opponent Rumanlolljee Gossamee. The High Court of Calcutta by a majority judgment had held that Greedhareejee's title as a founder had been established and that the bar of limitation pleaded by the respondent applied to the temple and the land on which it was built but not to the image and the movable property connected with it. In the result, Greedhareejee got a decree for so much of his claim as was not barred by the lapse of time. This conclusion was confirmed by the Privy Council. It would be noticed that since the dispute was between two rival claimants neither of whom was interested in pleading that the temple was a public temple, that aspect of the matter did not fall to be considered in the said litigation, and so, this decision can be regarded as an authority only for the proposition which it laid down in regard to the succession of the Shebaitship. The learned Attorney-General no doubt invited our attention to the fact that in the course of his judgment, Lords Hobhouse has mentioned that all the male members of the Vallabha's Family are in their lifetime esteemed by their community as partaking of the Divine essence, and as entitled to veneration and worship. This observation, however, can be of little help to the Tilkayat in the present proceedings where we have to deal with the matter on the basis of the Firman to which we have just referred. Besides, we may incidentally add that the Tilkayat's claims to property rights in the present proceedings based on the allegation that the members of the denomination regard all successors of Vallabha with the same respect which they had for Vallabha himself, sounds incongruous with the essential tenets of Vallabha's philosophy.

In *Mohan Lalji & another v. Gordhan Lalji Maharaj & others*², the dispute which was taken before the Privy Council was in regard to the right claimed by the sons of a daughter to the shebaitship of the temple of Vallabha sect : and in support of the said right the sons of the daughter relied upon the earlier decision of the Privy Council in the case of *Gossamnee Sree Greedhareejee*¹. In rejecting the plea made by the said sons, the Privy Council observed that the principle laid down in the earlier case cannot be applied so as to vest the shebaitship in persons who, according to the usages of the worship, cannot perform the rites of the office. In that case it was found that the sons of the daughter who were Bhats and who did not belong to the Gosain Kul were incompetent to perform the "diurnal rites for the deity worshipped.

by the sect " and so, the decision of the High Court which had rejected thier claim was confirmed. In this case again neither party was interested in pleading the public charcater of the temple and so, that point did not arise for decision.

The same comment falls to be made about the decision of the Allahabad High Court in *Gopal Lalji v. Gurdhar Lalji & others*¹. It is true that in that case the plaintiff challenged a gift deed executed by one Goswami of the Vallabha sect in favour of another Goswami and in doing so he alleged that the donor Goswami was a Trustee and not the owner of the property. But in the course of the evidence, it was virtually conceded by him that the property belonged to the donor Goswami, and so, the case was decided on that basis. In its judgment, the High Court observed that there can be no doubt that if we must regard the property as "trust property" in the strict sense, dedicated for a charitable or religious purpose in the hands of duly constituted trustees of the charitable or religious object, one or more of such trustees would have no power to alienate the trust property or delegate their powers and duties contrary to the trust. But the High Court found that the evidence adduced conclusively established that the property in question was private property and so, the challenge to the validity of the gift was repelled. This decision also cannot be of any assistance in deciding the question as to whether the temple with which the present proceedings are concerned is a private or a public temple. Besides, as we have already indicated, this question is really concluded by the Firman of 1934 and so, the temple must be held to be a public temple and in consequence the challenge to the validity of the Act on the basis that the Act has interfered with the Tilkayat's right of ownership over his private property cannot succeed.

Let us now examine the material provisions of the Act before dealing with the contentions of the Tilkayat that the said provisions contravene his fundamental rights under Article 19 (1) (f) and Articles 14 and 31(2) even on the basis that the temple is a public temple. The Act was passed to provide for the better administration and governance of the temple of Shri Shrinathji at Nathdwara. It consists of 38 sections. Section 2 is a definition section; under section 2 (1) "Board" means the Nathdwara Temple Board established and constituted under the Act, and section 2 (11) defines "Endowment" as meaning all property, movable or immovable belonging to or given or endowed in any name for the maintenance or support of the temple or for the performance of any service or charity connected therewith or for the benefit, convenience or comfort of the pilgrims visiting the temple, and includes—

- (a) the idols installed in the temple.
 - (b) the premises of the temple.
 - (c) all jagirs, muafis and other properties, movable or immovable, wherever situate and all income derived from any source whatsoever and standing in any name, dedicated to the temple or placed for any religious, pious or charitable purposes under the Board or purchased from out of the temple funds and all offerings and bhents made for and received on behalf of the temple.
- but shall not include any property belonging to the Goswami personally although the same or income thereof might hitherto have been utilised in part or in whole in the service of the temple.

Section 2 (vii) defines "temple" as meaning the temple of Shri Shrinathji at Nathdwara in Udaipur District and includes the temple of Shri Navnitpriyaji and Shri Madan Mohanlalji together with all additions thereto or all alterations thereof which may be made from time to time after the commencement of the Act

Sections 3 and 4 are important provisions of the Act. Section 3 provides that the ownership of the temple and all its endowments including all offerings which have been or may hereafter be made shall vest in the deity of Shri Shrinathji and the Board constituted under the Act shall be entitled to their possession. In other

words, all property of the temple vests in the temple and the right to claim possession of it vests in the Board. As a corollary to the provisions of sections 3, section 4 (1) provides that the administration of the temple and all its endowments shall vest in the Board constituted in the manner hereinafter provided. Sub-section (2) lays down that the Board shall be a body corporate by the name of the Nathdwara Temple Board and shall have perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and may sue or be sued in the said name. The composition of the Board has been prescribed by section 5 : it shall consist of a President, the Collector of Udaipur District and nine other members. The proviso to the section is important ; it says that the Goswami shall be one of such members if he is not otherwise disqualified to be member and is willing to serve as such. Section 5 (2) prescribes the disqualifications specified in clause (a) to (g)—unsoundness of mind adjudicated upon by competent Court, conviction involving moral turpitude ; adjudication as an insolvent or the status of an undischarged insolvent ; minority, the defect of being deaf-mute or leprosy ; holding an office or being a servant of the temple or being in receipt of any emoluments or perquisites from the temple ; being interested in a subsisting contract entered into with the temple ; and lastly, not professing the Hindu religion or not belonging to the Pushti-Margiya Vallabhi Sampradaya. There can be no doubt that “or” in clause (g) must mean “and,” for the context clearly indicates that way. There is a proviso to section 5 (2) which lays down that the disqualification as to the holding of an office or an employment under the temple shall not apply to the Goswami and the disqualification about the religion will not apply to the Collector ; that is to say, a Collector will be a member of the Board even though he may not be a Hindu and a follower of the Denomination. Section 5 (3) provides that the President of the Board shall be appointed by the State Government and shall for all purposes be deemed to be a member. Under section 5 (4) the Collector shall be an ex-officio member of the Board. Section 5 (5) provides that all the other members specified in sub-clause (1) shall be appointed by the State Government so as to secure representation of the Pushti-Margiya Vaishnavas from all over India. This clearly contemplates that the other members of the Board should not only be Hindus, but should also belong to the Denomination, for it is in that manner alone that their representation can be adequately secured. Section 6 gives liberty to the President or any member to resign his office by giving a notice in writing to the State Government. Under section 7 (1), the State Government is given the power to remove from office the President or any member, other than the ex-officio member, including the Goswami on any of the three grounds specified in clauses (a), (b) and (c) ; ground (a) refers to the disqualification specified by section 5 (2), ground (b) refers to the absence of the member for more than four consecutive meetings of the Board without obtaining leave for absence ; and ground (c) refers to the case where a member is guilty of corruption or misconduct in the administration of the endowment. Section 7 (2) provides a safeguard to the person against whom action is intended to be taken under sub-clause (1) and it lays down that no person shall be removed unless he has been given a reasonable opportunity of showing cause against his removal. It would be noticed that by operation of section 7 (1), the Goswami is liable to be removed, but that removal would, in a sense, be ineffective because the proviso to section 5 requires that the Goswami has to be a member of the Board so that even though he is removed for causes (b) and (c), he would automatically be deemed to be a member under proviso to section 5. It would be a different matter if the Goswami is removed by reason of the fact that he is disqualified on any of the grounds described in section 5 (2). Such a disqualification may presumably necessitate the appointment of a successor Goswami in lieu of the disqualified one and then it would be the successor Goswami who will be a member of the Board under the proviso to section 5 (1). This position is made clear if we look at section 11 which provides that any person ceasing to be a member shall, unless disqualified under section 5 (2), be eligible for re-appointment, whereas other members who are removed under section 7 (1) for causes specified in clauses (b) and (c) may be eligible for re-appointment ; the Goswami would be entitled to such re-appointment. Section 8 prescribes the term

of office at 3 years. Section 9 provides for the filling up of casual vacancies. Section 10 empowers the State Government to dissolve the Board and reconstitute it if it is satisfied that the existing Board is not competent to perform or persistently makes default in performing the duties imposed on it under this Act, or exceeds or abuses its powers, and this power can be exercised after due enquiry. This section further provides that if a Board is dissolved, immediate action should be taken to reconstitute a fresh Board in accordance with the provisions of this Act. Section 10 (2) provides a safeguard to the Board against which action is proposed to be taken under sub-section (1) inasmuch as it requires that before the notification of the Board's dissolution is issued, Government will communicate to the Board the grounds on which it proposes so to do, fix a reasonable time for the Board to show cause and consider its explanation or objections, if any. Section 10 (3) empowers the State Government, as a provisional and interim measure, to appoint a person to perform the functions of the Board until a fresh Board is reconstituted, and under section 10 (4) the State Government is given the power to fix the remuneration of the person so appointed. Section 12 makes every member of the Board liable for loss, waste or misapplication of any money or property belonging to the temple, provided such loss, waste or misapplication is a direct consequence of his wilful act or omission, and it allows a suit to be instituted to obtain such compensation. Under section 13 members of the Board as well as the President are entitled to draw travelling and halting allowances as may be prescribed. Section 14 deals with the office and meetings of the Board and section 15 provides that any defect or vacancy in the constitution of the Board will not invalidate the acts of the Board. Section 16 is important. It lays down that subject to the provisions of this Act and of the Rules made thereunder, the Board shall manage the properties and affairs of the temple and arrange for the conduct of the daily worship and ceremonies and of festivals in the temple according to the customs and usages of the Pushti Margiya Vallabhi Sampradaya. Section 17 (1) provides that the jewellery or other valuable movable property of a non perishable character the administration of which vests in the Board shall not be transferred without the previous sanction of the Board, and if the value of the property to be transferred exceeds ten thousand rupees the previous approval of the State Government has to be obtained. Section 17 (2) requires the previous sanction of the State Government for leasing the temple property for more than five years, or mortgaging, selling or otherwise alienating it. Section 18 imposes a ban on the borrowing power of the Board. Section 19 (1) provides for the appointment of the Chief Executive Officer of the temple, and the remaining four sub-sections of section 19 deal with his terms and conditions of service. Section 20 speaks of the powers and duties of the Chief Executive Officer which relate to the administration of the temple properties. Section 21 provides that the Board may appoint, suspend, remove, dismiss or reduce in rank or in any way, punish all officers and servants of the Board other than Chief Executive Officer, in accordance with rules made by the State Government. Section 22 is very important. It provides that save as otherwise expressly provided in or under this Act, nothing herein contained shall affect any established usage of the temple or the rights, honours emoluments and perquisites to which any person may, by custom or otherwise, be entitled in the temple. Section 23 deals with the budget, section 24 with accounts and section 25 with the Administration Report. Section 26 confers on the State Government power to call for such information and accounts as may, in its opinion, be reasonably necessary to satisfy it that the temple is being properly maintained, and its administration carried on according to the provisions of this Act. Under this section, the Board is under an obligation to furnish forthwith such information and accounts as may be called for by the State Government. Under section 27, the State Government may depute any person to inspect any movable or immovable property, records, correspondence, plans, accounts and other documents relating to the temple and its endowments, and the Board and its officers and servants shall be bound to afford all facilities to such persons for such inspection. Section 28 (1) specifies the purposes for which the funds of the temple may be utilised and section 28 (2) provides that without prejudice to the purposes referred to in sub-section (1)

the Board may, with the previous sanction of the State Government, order that the surplus funds of the temple be utilised for the purposes mentioned in clauses (a) to (e). Section 28 (3) requires that the order of the Board under sub-section (2) shall be published in the prescribed manner. Section 20 deals with the duties of trustee of specific endowments; section 30 (1) confers the power on the State Government to make Rules for carrying out all or any of the purposes of the Act; section 30 (2) provides that in particular and without prejudice to the generality of the foregoing power, the State Government shall have power to make Rules with reference to matters covered by clauses (a) to (i). Under sub-section (3) it is provided that the Rules made under this Act shall be placed before the House of the State Legislature at the session thereof next following. Section 31 provides that the State Government or any person interested may institute a suit in the Court of District Judge to obtain a decree for the reliefs mentioned in clauses (a) to (e). These reliefs correspond to the reliefs which may be obtained in a suit under section 92, Civil Procedure Code. In consequence, section 31 (2) provides that sections 92 and 93 and Order 1, rule 8 of the First Schedule to the Code of Civil Procedure shall have no application to any suit claiming any relief in respect of the administration or management of the temple and no suit in respect thereof shall be instituted except as provided by this Act. In other words, a suit which would normally have been filed under sections 92 and 93 and Order 1 rule 8 of the Code has now to be filed under section 31. Section 32 deals with the resistance of obstruction in obtaining possession and it provides that the order which may be passed by the Magistrate in such matters shall subject, to the result of any suit which may be filed to establish the right to the possession of the property, be final. Section 33 deals with the costs of the suit, etc. Section 34 provides that this Act shall have effect notwithstanding anything to the contrary contained in any law for the time being in force or in any scheme of management framed before the commencement of this Act or in any decree, order, practice, custom or usage. Section 35 contains a transitional provision and it empowers the State Government to appoint one or more persons to discharge all or any of the duties of the Board after the Act comes into force and before the first Board is constituted. Under section 36 it is provided that if any difficulty arises in giving effect to any of the provisions of this Act, the State Government may, by order, give such directions and make such provisions as may appear to it to be necessary for the purpose of removing the difficulty. Section 37 prescribes a bar to suit or proceeding against the State Government for anything done or purported to be done by it under the provisions of this Act. The last section deals with repeal and savings. The Rajasthan Ordinance No. 2 of 1959 which had preceded this Act has been repealed by this section. That, in brief, is the scheme of the Act.

• Later, we will have occasion to deal with the specific sections which have been challenged before us, but at this stage, it is necessary to consider the broad scheme of the Act in order to be able to appreciate the points raised by the Tilkayat and the Denomination in challenging its validity. For the purpose of ascertaining the true scope and effect of the scheme envisaged by the Act it is necessary to concentrate on sections 3, 4, 16, 22, and 34. The scheme of the Act, as its Preamble indicates, is to provide for the better administration and governance of the temple of Shri Shrinathji at Nathdwara. It proceeds on the basis that the temple of Shrinathji is a public temple and having regard to the background of the administration of its affairs in the past, the Legislature thought that it was necessary to make a more satisfactory provision which will lead to its better administration and governance. In doing so, the Legislature has taken precaution to safeguard the performance of religious rites and the observance of religious practices in accordance with traditional usage and custom. When the validity of any legislative enactment is impugned on the ground that its material provisions contravene one or the other of the fundamental rights guaranteed by the Constitution, it is necessary to bear in mind the primary rule of construction. If the impugned provisions of the statute are reasonably capable of a construction which does not involve the infringement of any fundamental rights, that construction must be preferred though it may reasonably be possible to adopt

another construction which leads to the infringement of the said fundamental rights. If the impugned provisions are reasonably not capable of the construction which would save its validity, that of course is another matter, but if two constructions are reasonably possible, then it is necessary that the Courts should adopt that construction which upholds the validity of the Act rather than the one which affects its validity. Bearing this rule of construction in mind, we must examine the five sections to which we have just referred. Section 3 no doubt provides for the vesting of the temple property and all its endowments including offerings in the deity of Shrinathji, and that clearly is unexceptionable. If the temple is a public temple, under Hindu Law the idol of Shrinathji is a juridical person and so, the ownership of the temple and all its endowments including offerings made before the idol constitute the property of the idol. Having thus stated what is the true legal position about the ownership of the temple and the endowments, section 3 proceeds to add that the Board constituted under this Act shall be entitled to the possession of the said property. If the Legislature intended to provide for the better administration of the temple properties, it was absolutely essential to constitute a proper Board to look after the said administration, and so, all that section 3 does is to enable the Board to take care of the temple properties and in that sense, it provides that the Board shall be entitled to claim possession of the said properties. In the context, this provision does not mean that the Board would be entitled to dispossess persons who are in possession of the said properties, it only means that the Board will be entitled to protect its possession by taking such steps as in law may be open to it and necessary in that behalf. Section 4 is a mere corollary to section 3 because it provides that the administration of the temple and all its endowments shall vest in the Board. Thus the result of reading sections 3 and 4 is that the statute declares that the properties of the temple vest in the deity of Shrinathji and provides for the administration of the said properties by appointing a Board and entrusting to the Board the said administration.

The true scope and effect of these provisions can be properly appreciated only when they are correlated to sections 16 and 22. Section 16 prescribes the duties of the Board: it requires that subject to the provisions of the Act and the Rules framed under it, the Board has to manage the properties and affairs of the temple and arrange for the conduct of the daily worship and ceremonies and of festivals in the temple according to the customs and usages of the Pusti Margiya Vallabhi Sampradaya. It would be noticed that two different categories of duties are imposed upon the Board. The first duty is to manage the properties and secular affairs of the temple. This naturally is a very important part of the assignment of the Board. Having thus provided for the discharge of its important function in the matter of administering the properties of the temple, the section adds that it will be the duty of the Board to arrange for the religious worships, ceremonies and festivals in the temple, but this has to be done according to the customs and usages of the Denomination. It is thus clear that the duties of the Board in so far as they relate to the worship and other religious ceremonies and festivals, it is the traditional customs and usage which is of paramount importance. In other words, the Legislature had taken precaution to safeguard the due observance of the religious ceremonies, worship and festivals according to the custom and usage of the Denomination. Section 22 makes this position still clearer, it provides that save as otherwise expressly provided in or under the Act, nothing herein contained shall affect any established usage of the temple or the rights, honours, emoluments and perquisites to which any person may, by custom or otherwise, be entitled in the temple. The saving provisions of section 22 are very wide, unless there is an express provision to the contrary in the Act, all matters which have been saved by section 22 will be governed by the traditional usage and custom. If only we consider the very wide terms in which the saving clause under section 22 has been drafted, it will be clear that the Legislature was anxious to provide for the better administration of the temple properties and not to infringe upon the traditional religious ceremonies, worship and festivals in the temple and the rights, honours, emoluments and the perquisites attached thereto. Section 34 which

provides for the over-riding effect of the Act must be read along with section 22 and so when it provides that the Act shall have effect notwithstanding practice, custom or usage it only means that practice, custom and usage will not avail only if there is an express provision to the contrary as prescribed by section 22.

Reading these five sections together, it seems to us clear that the Legislature has provided for the appointment of a Board to look after the administration of the property of the temple and manage its secular affairs as well as the religious affairs of the temple, but in regard to these religious affairs consisting of the worship, services, festivals and other ceremonies, the custom prevailing in the temple consistently with the tenets of Vallabhi Philosophy are to be respected. The learned Attorney-General no doubt attempted to read sections 3 and 4 in a very wide manner and he sought to place a narrow construction on section 22, thereby indicating that even religious ceremonies and rights and festivals would remain within the exclusive jurisdiction of the Board without reference to the traditional custom or usage. We do not think that it would be appropriate to adopt such an approach in construing the relevant provisions of the Act. We have no doubt that when Rules are framed under section 30 of the Act, they would be framed bearing in mind these essential features of the material provisions of the Act and will help to carry out the object of the Act in keeping the religious part of the services and worship at the temple apart from the secular part of the administration of the temple properties. Broadly stated, the former will be carried out according to the traditional usage and custom and the latter according to the provisions of the Act.

On behalf of the Tilkayat, the main contention which has been raised before us by the learned Attorney-General is that his right of property has been infringed under Article 19 (1) (f) and Mr. Pathak has added that the relevant provisions infringed the Tilkayat's rights under Article 31 (2) of the Constitution. As we have already indicated this latter contention is raised in the writ petition filed by the Tilkayat in this Court. Now in deciding the validity of these contentions it is necessary to revert to the Firman issued by the Rana of Udaipur in 1934, because the rights of the Tilkayat have to be judged in the light of the said Firman. We have already noticed that the said Firman clearly declares that the Tilkayat is merely a Custodian, Manager and Trustee of the property of the shrine of Shrinathji and that the Udaipur Darbar has the absolute right to supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine. Having regard to the unambiguous and emphatic words used in clause 1 of the Firman and having regard to other drastic provisions contained in its remaining clauses, we are inclined to think that this Firman made the Tilkayat for the time being a Custodian, Manager and Trustee, and nothing more. As a Custodian or Manager, he had the right to manage the properties of the temple, subject, of course, to the overall supervision of the Darbar, the right of the Darbar in that behalf being absolute. He was also a Trustee of the said property and the word "trustee" in the context must mean trustee in the technical legal sense. In other words, it is not open to the Tilkayat to claim that he has rights of a Mahant or a Shebait; his rights are now defined and he cannot claim any higher rights after the Firman was issued. There can be no doubt that the right to have the custody of the property such as the Custodian has, or the right to manage the property such as the Manager possesses, or the right to administer the trust property for the benefit of the beneficiary which the Trustee can do, cannot be regarded as a right to property under Article 19 (1) (f) and for the same reason, it does not constitute property under Article 31 (2). If it is held that the Tilkayat was no more than a Custodian, Manager and Trustee properly so called, there can be no doubt that he is not entitled to rely either on Article 19 (1) (f) or on Article 31 (2). Therefore, on this construction of clause 1 of the Firman, the short answer to the pleas raised by the Tilkayat under Articles 19 (1) (f) and 31 (2) is that the rights such as he possesses under the said clause cannot attract Article 19 (1) (f) or Article 31 (2).

It has, however, been strenuously urged before us that the words "Custodian, Manager or Trustee" should be liberally construed and the position of the Tilkayat

should be taken to be similar to that of a Mahant of a Math or a Shebait of a temple. Under Hindu Law, idols and Maths are both juridical persons and Shebait and Mahants who manage their properties are recognised to possess certain rights to claim a certain status. A Shebait by virtue of his office is the person entitled to administer the property attached to the temple of which he is a Shebait. Similarly a Mahant who is a spiritual head of the Math or religious institution is entitled to manage the said property for and on behalf of the Math. The position of the Mahant under Hindu Law is not strictly that of a Trustee. As Mr. Justice Ameer Ali delivering the judgment of the Board observed in *Vidya Varuthi Thirtha v Bolusami Ayyar and others*¹

called by whatever name he is only the manager and custodian of the idol or the institution.

When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency.

In almost every case the Mahant is given the right to a part of the usufruct the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him nor is he a trustee in the English sense of the term although in view of the obligations and duties resting on him he is answerable as a trustee in the general sense for mal administration.

This position has been accepted by this Court in *The Commissioner, Hindu Religious Endowments Madras v Sri Lakshmindra Thirtha Swamiyar of Sri Srirang Mutt*². Speaking for the unanimous Court in that case Mukherjee J observed

Thus in the concept of Mahantship as in Shebaitship both the elements of office and property of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect of endowed properties and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which though anomalous to some extent is still a genuine legal right.

On this view, this Court held that the right of this character vesting in a Mahant is a right to property under Article 19 (1) (f) of the Constitution. Relying on this decision it is urged that the Firman should be construed to make the Tilkayat a Mahant or a Shebait and as such clothed with rights which amount to a right to property under Article 19 (1) (f) and which constitute property under Article 31 (2).

Assuming that the construction of clause 1 of the Firman suggested by the learned Attorney-General is possible let us examine the position on the basis that the Tilkayat can, in theory, be regarded as a Mahant of the temple. What then are the rights which according to the relevant evidence produced in this case, the Mahant is entitled in respect of the temple? As a Tilkayat he has a right to reside in the temple as such Mahant he has a right to conduct or arrange for and supervise the worship of the idol in the temple and the services rendered therein in accordance with the traditional custom and usage. He has also the right to receive bhents on behalf of the idol and distribute Prasad in accordance with the traditional custom and usage. So far as these rights are concerned, they have not been affected by the Act and so, no argument can be raised that in affecting the said rights the Act has contravened either Article 19 (1) (f) or Article 31 (2). It is, however, argued that as a Mahant the Tilkayat had the right to manage the properties of the temple to lease them out and in case of necessity to alienate them for the purpose of the temple and it is suggested that these rights constitute a right to property under Article 19 (1) (f) and property under Article 31 (2). The learned Attorney-General fairly conceded that there was no evidence to show that the right to alienate had ever been exercised in this case but he contends that the existence of the right cannot be denied. It is also conceded that the right to manage the properties was subject to the strict and absolute supervision of the Darbar but it is suggested that even so it is a right which must be regarded as a right to property. In dealing with this argument, it is necessary to bear in mind that the extent of the rights ava-

1 (1921) L.R. 48 I.A. 302 at page 311 I.L.R. 44 Mad 831 41 M.L.J. 346 (P.C.)

2 (1954) S.C.R. 100 (1954) S.C.J. 335 (1954) I.M.L.J. 596

lable to the Tilkayat under clause 1 of the Firman cannot be said to have become larger by virtue of the fact that the Constitution came into force in 1950. It is only the rights to property which subsisted in the Tilkayat under the said Firman that would be protected by the Constitution, provided, of course, they are rights which attract the provisions of Article 19 (1) (f) or Article 31 (2).

This branch of the argument urged on behalf of the Tilkayat naturally rests on the decision of this Court in the case of the *Commissioner, Hindu Religious Endowments, Madras*¹, that right of a Mahant does amount to "a genuine legal right" and that the said right must be held to fall under Article 19 (1) (f) because the word "property" used in the said clause ought to receive a very liberal interpretation. It will be recalled that in the said case, this Court in terms and expressly approved of the decision of Mr. Justice Ameer Ali in *Vidya Varuhi Thirtha's case*², which exhaustively dealt with the position of the Mahant or the Shebait under Hindu law. We have already quoted the relevant observations made in that judgment and it would be relevant to repeat one of those observations in which the Privy Council stated that in almost every case the Mahant is given the right to a part of the usufruct, the mode of enjoyment and the amount of usufruct depending again on usage and custom. It is true that in the passage in Mr. Justice Mukerjee's judgment in the case of the *Commissioner, Hindu Religious Endowments, Madras*¹, this particular statement has not been cited; but having referred to the rights which the Mahant can claim, the learned Judge has added that these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right. It is clear that when this Court held that the rights vesting in the Mahant as a manager of the Math amount to a genuine legal right to property, this Court undoubtedly had in mind the fact that usually, the Mahant or the Shebait is entitled to be maintained out of the property of the Math or the temple and that the extent of the right to a part of the usufruct and the mode of enjoyment and the amount of the usufruct always depended on usage and custom of the Math or the temple. It is in the light of these rights, including particularly the right to claim a part of the usufruct for his maintenance that this Court held that the totality of the rights amount to a right to property under Article 19 (1) (f).

That takes us to the question as to the nature and extent of the Tilkayat's rights in regard to the temple property. It is clear that the Tilkayat never used any income from the property of the temple for his personal needs or private purpose. It is true that the learned Attorney-General suggested that this consistent course of conduct spreading over a large number of years was the result of what he described as self-abnegation on the part of the Tilkayats from generation to generation and from Tilkayat's point of view, it can be so regarded because the Tilkayat thought and claimed that the temple and his properties together constituted his private property. But once we reach the conclusion that the temple is a public temple and the properties belonging to it are the properties of the temple over which the Tilkayat has no title or right, we will have to take into account the fact that during the long course of the management of this temple, the Tilkayat has never claimed any proprietary interest to any part of the usufruct of the properties of the temple for his private personal needs, and so, that proprietary interest of which Mr. Justice Ameer Ali spoke in dealing with the position of the Mahant and the Shebait and to which this Court referred in the case of *Commissioner, Hindu Religious Endowments, Madras*¹, is lacking in the present case. What the Tilkayat can claim is merely the right to manage the property, to create leases in respect of the properties in a reasonable manner and the theoretical right to alienate the property for the purpose of the temple; and be it noted that these rights could be exercised by the Tilkayat under the absolute and strict supervision of the Darbar of Udaipur. Now, the right to manage the property belonging to the temple, or the right to create a lease of the property on behalf of the temple, or the right to alienate the property for the purpose of the temple under the supervision of the Darbar cannot, in our opinion, be equated with the totality

1. (1954) S.C.J. 335; (1954) 1 M.L.J. 596; (1954) S.C.R. 1005.

2. (1921) L.R. 48 I.A. 302 at p. 311; I.L.R. 44 Mad. 831; 41 M.L.J. 346 (P.C.)

of the powers generally possessed by the Mahant or even the Shebait, and so, we are not prepared to hold that having regard to the character and extent of the rights which can be legitimately claimed by the Tilkayat even on the basis that he was a Mahant governed by the terms of the Firman, amount to a right to property under Article 19 (1) (f) or constitute property under Article 31 (2)

Besides, we may add that even if it was held that these rights constituted a right to hold property their regulation by the relevant provisions of the Act would undoubtedly be protected by Article 19 (5). The temple is a public temple and what the Legislature has purported to do is to regulate the administration of the properties of the temple by the Board of which the Tilkayat is and has to be a member. Having regard to the large estate owned by the Tilkayat and having regard to the very wide extent of the offerings made to the temple by millions of devotees from day to day, the Legislature was clearly justified in providing for proper administration of the properties of the temple. The restrictions imposed by the Act must, therefore, be treated as reasonable and in the interests of the general public.

Turning to Mr Pathak's argument that the rights constitute property under Article 31 (2) and the Act contravenes the said provision because no compensation had been provided for or no principles have been prescribed in connection therewith, the answer would be the same. The right which the Tilkayat possesses cannot be regarded as property for the purpose of Article 31 (2). Besides, even if the said rights are held to be property for the purpose of Article 31 (2), there are some obvious answers to the plea which may be briefly indicated.

After Article 31 (2) was amended by the Constitution (Fourth Amendment) Act, 1955, the position with regard to the scope and effect of the provisions of Article 31 (1) and 31 (2) is no longer in doubt. Article 31 (2) deals with the compulsory acquisition or requisition of a citizen's property and it provides that a citizen's property can be compulsorily acquired or requisitioned only for a public purpose and by authority of law which provides for compensation and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given, and it adds that no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate. Article 31 (2) A which is expressed in a negative form really amounts to this that where a law provides for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall be deemed to provide for the compulsory acquisition or requisition of property. If, on the other hand, the transfer of the ownership or the right to possession of any property is not made to the State or to a corporation owned or controlled by the State, it would not be regarded as compulsory acquisition or requisition of the property, notwithstanding that it does deprive any person of his property. In other words, the power to make a compulsory acquisition or requisition of a citizen's property provided for by Article 31 (2) is what the American Lawyers described as "eminent domain", all other cases where a citizen is deprived of his property are covered by Article 31 (1) and they can broadly be said to rest on the police powers of the State. Deprivation of property falling under the latter category of cases cannot be effected save by authority of law, this Court has held that the expression "save by authority of law" postulates that the law by whose authority such deprivation can be effected must be a valid law in the sense that it must not contravene the other fundamental rights guaranteed by the Constitution.

The argument which has been urged before us by Mr Pathak is that the right to administer the properties of the temple which vested in the Mahant has been compulsorily acquired and transferred to a Board constituted under the Act which Board is controlled by the State. We will assume that the Board in question is controlled by the State but the question still remains whether the right which is allowed to vest in the Tilkayat has been compulsorily acquired and has been transferred to the Board. In our opinion, what the Act purports to do is to extinguish the secular office vesting in the Tilkayat by which he was managing the properties

of the temple. It is well-known that a Mahant combines in himself both a religious and a secular office. This latter office has been extinguished by the Act; and so, it cannot be said that the rights vesting in the Tilkayat to administer the properties have been compulsorily acquired. Acquisition of property, in the context, means the extinction of the citizens' rights in the property and the conferment of the said rights in the State or the State-owned corporation. In the present case, the Act extinguishes the Mahant's rights and then creates another body for the purpose of administering the properties of the temple. In other words, the office of one functionary is brought to an end and another functionary has come into existence in its place. Such a process cannot be said to constitute the acquisition of the extinguished office or of the rights vesting in the person holding that office.

Besides, there is another way in which this question may perhaps be considered. What the Act purports to do is not to acquire the Tilkayat's rights but to require him to share those rights with the other members of the Board. We have already seen that the Act postulates that the Mahant for the time being has to be a member of the Board and so, the administration of the properties which was so long carried on by the Mahant alone would hereafter have to be carried on by the Mahant along with his colleagues in the Board. This again cannot, we think, be regarded as a compulsory acquisition of the Tilkayat's rights. It is not suggested that the effect of the relevant provisions of the Act is to bring about the requisitioning of the said rights. Therefore, even if it is assumed that the rights claimed by the Tilkayat constitute property under Article 31 (2), we do not think that the provisions of Article 31 (2) apply to the Act. But as we have already held, the rights in question do not amount to a right to hold property under Article 19 (1) (f) or to property under Article 31 (2).

That takes us to the argument that the Act is invalid because it contravenes Article 14. In our opinion, there is no substance in this argument. We have referred to the historical background of the present legislation. At the time when Ordinance No. II of 1959 was issued, it had come to the knowledge of the Government of Rajasthan that valuables such as jewelleries, ornaments, gold and silver ware and cash had been removed by the Tilkayat in the month of December, 1957, and as the successor of the State of Mewar, the State of Rajasthan had to exercise its right of supervising the due administration of the properties of the temple. There is no doubt that the shrine at Nathdwara holds a unique position amongst the Hindu shrines in the State of Rajasthan and no temple can be regarded as comparable with it. Besides, the Tilkayat himself had entered into negotiations for the purpose of obtaining a proper scheme for the administration of the temple properties and for that purpose, a suit under section 92 of the Code had in fact been filed. A Commission of Enquiry had to be appointed to investigate into the removal of the valuables. If the temple is a public temple and the Legislature thought that it was essential to safeguard the interests of the temple by taking adequate legislative action in that behalf, it is difficult to appreciate how the Tilkayat can seriously contend that in passing the Act, the Legislature has been guilty of unconstitutional discrimination. As has been held by this Court in the case of *Shri Ram Krishna Dahmia v. Shri Justice S. R. Tendolkar & others*¹, that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself. Therefore, the plea raised under Article 14 fails.

The next point to consider is in regard to the pleas raised more by the Denomination than by the Tilkayat himself under Articles 25 and 26 of the Constitution. The attitude adopted by the Denomination in its writ petition is not very easy to appreciate. In the writ petition filed on behalf of the Denomination, it was urged that the Tilkayat himself is the owner of all the properties of the temple and as such, was entitled to manage them in his discretion and as he liked. This plea clearly

1. (1959) S.C.J. 147; (1959) 1 An. W.R. S.C.R. 279, 297.
(S.C.) 67; (1959) 1 M.L.J. (S.C.) 67; (1959)

supported the Tilkayat's stand that the temple in question was a private temple belonging to himself and as such, all the temple properties were his private properties. The Denomination was clearly in two minds. It was inclined more to support the Tilkayat's case than to put up an alternative case that the Denomination was interested in the management of these properties. Even so, some allegations have been made in the writ petition filed on behalf of the Denomination from which it may perhaps be inferred that it was the alternative case of the Denomination that the temple and the properties connected therewith belonged to the Denomination according to its usages and tradition, and therefore, the management of the said temple and the properties cannot be transferred to the Board. It is this latter alternative plea which is based on Article 25 (1) and Article 26 (b) of the Constitution. The argument is that the Act contravenes the right guaranteed to the Denomination by Article 25 (1) freely to practice its religion and that it also contravenes the Denomination's right guaranteed under Article 26 (b) and (d) to manage its own affairs in matters of religion and to administer its property in accordance with law. For the purpose of dealing with these arguments, we will assume that the Denomination has a beneficial interest in the properties of the temple.

Articles 25 and 26 constitute the fundamental rights to freedom of religion guaranteed to the citizens of this country. Article 25 (1) protects the citizens' fundamental right to freedom of conscience and his right freely to profess, practise and propagate religion. The protection given to this right is, however, not absolute. It is subject to public order, morality and health as Article 25 (1) itself denotes. It is also subject to the laws, existing or future, which are specified in Article 25 (2). Article 26 guarantees freedom of the Denominations or sections thereof to manage their religious affairs and their properties. Article 26 (b) provides that subject to public order, morality and health every religious Denomination or any section thereof shall have the right to manage its own affairs in matters of religion, and Article 26 (d) lays down a similar right to administer the property of the Denomination in accordance with law. Article 26 (c) refers to the right of the Denomination to own and acquire movable and immovable property and it is in respect of such property that clause (d) makes the provision which we have just quoted. The scope and effect of these articles has been considered by this Court on several occasions. "The word 'religion' used in Article 25 (1)," observed Mukherjea, J., speaking for the Court in the case of the *Commissioner, Hindu Religious Endowments, Madras*¹

is a matter of faith with individuals and communities and it is not necessarily theistic. It undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to the spiritual well-being but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept; it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress.

In *Shri Venkataramana Devaru & others v. The State of Mysore and others*², Venkatarama Aiyar, J., observed "that the matters of religion in Article 26 (b) include even practices which are regarded by the community as part of its religion." It would thus be clear that religious practice to which Article 25 (1) refers and affairs in matters of religion to which Article 26 (b) refers, include practices which are an integral part of the religion itself and the protection guaranteed by Articles 25 (1) and 26 (b) extends to such practices.

In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas

1 (1954) S.C.J. 330 (1954) 1 M.L.J. 506
(1954) S.C.R. 1005.

2 (1958) S.C.J. 382 (1958) 1 M.L.J. 481.

(S.C.) 109 (1958) 1 M.L.J. (S.C.) 109 1958
S.C.R. 895 at 909

another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of *The Durgah Committee Ajmer and another v. Syed Hussain Ali and others*¹, and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26.

In this connection, it cannot be ignored that what is protected under Articles 25 (1) and 26 (b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affairs which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Article 25 (1) or Article 26 (b) has been contravened. The protection is given to the practice of religion and to the Denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practice religion or a claim is made on behalf of the Denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matter of religion, then, of course, the right guaranteed by Article 25 (1) and Article 26 (b) cannot be contravened.

It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regarded marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Articles 25 (1) and 26 (b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Articles 25 (1) and 26 (b), Latham, C.J.'s observation in *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth*², that

1. (1962) 1 S.C.R. 383 at page 411.

2. 67 C.L.R. 116 at page 123.

"what is religion to one is superstition to another", on which Mr Pathak relies, is of no relevance. If an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Article 25 (1) and Article 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the Denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Article 25 (1) or Article 26 (b). This aspect of the matter must be borne in mind in dealing with the true scope and effect of Article 25 (1) and Article 26 (b).

Let us then enquire what is the right which has been contravened by the relevant provisions of the Act. The only right which, according to the Denomination has been contravened is the right of the Tilkayat to manage the property belonging to the temple. It is urged that throughout the history of this temple its properties have been managed by the Tilkayat and so, such management by the Tilkayat amounts to a religious practice under Article 25 (1) and constitutes the Denomination's right to manage the affairs of its religion under Article 26 (b). We have no hesitation in rejecting this argument. The right to manage the properties of the temple is a purely secular matter and it cannot, in our opinion, be regarded as a religious practice so as to fall under Article 25 (1) or as amounting to affairs in matters of religion. It is true that the Tilkayats have been respected by the followers of the Denomination and it is also true that the management has remained with the Tilkayats, except on occasions like the minority of the Tilkayat when the Court of Wards stepped in. If the temple had been private and the properties of the temple had belonged to the Tilkayat, it was another matter. But once it is held that the temple is a public temple, it is difficult to accede to the argument that the tenets of the Vallabha cult require as a matter of religion that the properties must be managed by the Tilkayat. In fact, no such tenet has been adduced before us. So long as the Denomination believed that the property belonged to the Tilkayat like the temple, there was no occasion to consider whether the management of the property should be in the hands of anybody else. The course of conduct of the Denomination and the Tilkayat based on that belief may have spread for many years but, in our opinion, such a course of conduct cannot be regarded as giving rise to a religious practice under Article 25 (1). A distinction must always be made between a practice which is religious and a practice in regard to a matter which is purely secular and has no element of religion associated with it. Therefore, we are satisfied that the claim made by the Denomination that the Act impinges on the rights guaranteed to it by Articles 25 (1) and 26 (b) must be rejected.

That leaves one more point to be considered under Article 26 (d). It is urged that the right of the Denomination to administer its property has virtually been taken away by the Act, and so, it is invalid. It would be noticed that Article 26 (d) recognises the Denominations' right to administer its property, but it clearly provides that the said right to administer the property must be in accordance with law. Mr Saxtri for the Denomination suggested that law in the context is the law prescribed by the religious tenets of the Denomination and not a legislative enactment passed by a competent Legislature. In our opinion, this argument is wholly untenable. In the context, the law means a law passed by a competent Legislature and Article 26 (d) provides that though the Denomination has the right to administer its property, it must administer the property in accordance with law. In other words, this clause emphatically brings out the competence of the Legislature to make a law in regard to the administration of the property belonging to the Denomination. It is true that under the guise of regulating the administration of the property by the Denomination, the Denomination's right must not be extinguished or altogether

destroyed. That is what this Court has held in the case of the *Commissioner, Hindu Religious Endowments, Madras*¹ and *Ratilal Panachand Gandhi v. The State of Bombay and others*².

Incidentally, this clause will help to determine the scope and effect of the provisions of Article 26 (b). Administration of the Denomination's property which is the subject-matter of this clause is obviously outside the scope of Article 26 (b). Matters relating to the administration of the Denomination's property fall to be governed by Article 26 (d) and cannot attract the provisions of Article 26 (b). Article 26 (b) relates to affairs in matters of religion such as the performance of the religious rites or ceremonies, or the observance of religious festivals and the like; it does not refer to the administration of the property at all. Article 26 (d) therefore, justifies the enactment of a law to regulate the administration of the Denomination's property and that is precisely what the Act has purported to do in the present case. If the clause "affairs in matters of religion" were to include affairs in regard to all matters, whether religious or not, the provision under Article 26 (d) for legislative regulation of the administration of the Denomination's property would be rendered illusory.

It is, however, argued that by the constitution of the Board in which the administration of the property now vests is not the Denomination, and since the administration is now left to the Board, the Denomination has been wholly deprived of its right to administer the property. It is remarkable that this plea should be made by the representatives of the Denomination who in their writ petition were prepared to support the Tilkayat in his case that the temple and the properties of the temple were his private property. That apart, we think that the constitution of the Board has been deliberately so prescribed by the Legislature as to ensure that the Denomination should be adequately and fairly represented on the Board. We have already construed section 5 and we have held that section 5 (2) (g) requires that the members of the Board other than the Collector of Udaipur District should not only profess Hindu religion but must also belong to the Pushti-Margiya Vallabhi Sampradaya. It is true that these members are nominated by the State Government, but we have not been told how else that could have been effectively arranged in the interests of the temple itself. The number of the devotees visiting the temple runs into lacs; there is no organisation which comprehensively represents the devotees as a class; there is no register of the devotees and in the very nature of things, it is impossible to keep such a register. Therefore, the very large mass of Vallabha's followers who constitute the Denomination can be represented on the Board of management only by a proper nomination made by the State Government, and so, we are not impressed by the plea that the management by the Board constituted under the Act will not be the management of the Denomination. In this connection, we may refer to clause 1 of the Firman which vested in the Darbar absolute right to supervise the management of the property. As a successor in interest of the Darbar, the State of Rajasthan can be trusted to nominate members on the Board who would fairly represent the Denomination. Having regard to all the relevant circumstances of this case, we do not think that the Legislature could have adopted any other alternative for the purpose of constituting the Board. Therefore, we must hold that the challenge to the validity of the Act on the ground that it contravenes Articles 25 (1), 26 (b) and 26 (d) must be repelled.

It still remains to consider the provisions of the Act which have been challenged by the Tilkayat and the Denomination as well as those which have been struck down by the High Court and in respect of which the State has preferred appeals. We will take these sections in their serial order. We have considered sections 3, 4, 16, 22 and 34 and have held that these sections are valid because the scheme envisaged by the said sections clearly protects the religious rites, ceremonies and

1. (1954) S.C.J. 335 : (1954) 1 M.L.J. 595 : (1954) C.R.S. 1005. 2. (1954) S.C.J. 480 : (1954) 1 M.L.J. 718 : (1954) S.C.R. 1055.

services rendered in the temple and the Tilkayat's status and powers in respect thereof. The said scheme merely allows the administration of the properties of the temple which is a purely secular matter to be undertaken by the Board, and so, it is not necessary to refer to the said sections again.

Section 2 (viii) which defines a temple as including the temple of Shri Navut Priyaji and Shri Madan Mohanlalji has been struck down by the High Court in regard to the said two subsidiary deities. The High Court has held that the two deities Navut Priyaji and Madan Mohanlalji are the private deities of the Tilkayat and it was not competent to the Legislature to include them within the definition of the temple under section 2 (viii). It was urged before the High Court that the said two idols had been transferred by the Tilkayat to the public temple and made a part of it, but it has held that there was no gift or trust deed by the Tilkayat divesting himself of all his rights in those two idols and its property and so, the validity of the section could not be sustained on the ground of such transfer. The correctness of this conclusion is challenged by the learned Solicitor-General on behalf of the State. In dealing with this question, the conduct of the Tilkayat needs to be examined. On 15th October, 1956, a report was made by Mr Ranawat to the Tilkayat in respect of these two idols. It appears that the grant of some villages in respect of these idols stood in the name of the Tilkayat and after the said villages were resumed by the State, a question arose as to the compensation payable to the owner of the said villages. In that connection, Mr Ranawat reported to the Tilkayat that it would be to the advantage of the two idols if the said lands along with the idols were treated as a part of the public temple. He cited the precedent of the lands belonging to the Nathdwara Temple in support of his plea. On receiving this report, the Tilkayat was pleased to transfer the ownership of Shri Thakur Navut Priyaji, Shri Madan Mohanlalji and Bethaks to the principal temple of Shri Shrinathji. Of course, he retained to himself the right and privilege of worship over those temples and Bethaks as in the case of Shrinathji temple. The Tilkayat also expressed his concurrence with the proposal made in this report and signed in token of his agreement. It appears that after orders were issued in accordance with the decision of the Tilkayat, the two temples were treated as part of the bigger temple of Shrinathji. This is evidenced by the resolution which was passed at the meeting of the Power of Attorney Holders of the Tilkayat on the same day i.e., 15th October, 1956. One of the resolutions passed at the said meeting shows that the proposal regarding the Temple and Bethaks owned by His Holiness stating therein that His Holiness had been pleased to transfer the ownership thereof to Shrinathji, was considered. That proposal along with the list of temples and Bethaks was produced before the Committee. The Tilkayat was present at the meeting and he confirmed the proposal and put his signature thereon before the Committee. Thereupon, the Committee accepted the proposal with thanks and instructed the Executive Officer to do the needful in that behalf. Thus, the Tilkayat proposed to the Committee of his Power of Attorney Holders that the two idols and their Bethaks should be transferred from his private estate to the principal temple of Shrinathji and that proposal was accepted and thereafter the two idols were treated as part of the principal temple.

After this transfer was thus formally completed it appears that the Tilkayat was inclined to change his mind and so, in submitting to the Committee a list of temples and Bethaks transferred by him to the principal temple of Shrinathji, he put a heading to the list which showed that the said transfer had been made for management and administration only and was not intended to be an absolute transfer. This was done on or about 23rd November, 1956.

This conduct on the part of the Tilkayat was naturally disapproved by the Committee and the heading of the list was objected to by it in a letter written on 31st December, 1956. To this letter the Tilkayat gave a reply on 7th January, 1957, and he sought to explain and justify the wording adopted in the heading of the list. It is thus clear that the heading of the list forwarded by the Tilkayat to the Com-

mittee must be ignored because that heading clearly shows a change of mind on the part of the Tilkayat and the question as to whether the two idols form part of the principal temple of Shrinathji must be decided in the light of what transpired on 15th October, 1956. Judged in that way, there can be no doubt that the Tilkayat solemnly transferred the two idols to the principal temple and in that sense, gave up his ownership over the idols and a formal proposal made in that behalf was accepted by the Committee. In our opinion, the High Court was in error in not giving effect to this transfer on the ground that no gift or trust deed had been duly executed by the Tilkayat in that behalf. A dedication of private property to a charity need not be made by a writing; it can be made orally or even can be inferred from conduct. In the present case, there is much more than conduct in support of the State's plea that the two idols had been transferred. There is a formal report made by the Manager to the Tilkayat which was accepted by the Tilkayat; it was followed by a formal proposal made by the Tilkayat to the Committee and the Committee at its meeting formally accepted that proposal and at the meeting when this proposal was accepted, the Tilkayat was present. Therefore, we must hold that the two idols now form part of the principal temple and have been properly included within the definition of the word "temple" under section 2 (viii). We would accordingly set aside the decision of the High Court and uphold the validity of section 2 (viii).

The proviso to section 5 (2) (g) has been attacked by the learned Attorney-General. He contends that in making the Collector a statutory member of the Board even though he may not be a Hindu and may not belong to the denomination, the Legislature has contravened Articles 25 (1) and 26 (b). We have already dealt with the general plea raised under the said two articles. We do not think that the provisions that the Collector who is a statutory member of the Board need not satisfy the requirements of section 5 (2) (g), can be said to be invalid. The sole object in making the Collector a member of the Board is to associate the Chief Executive Officer in the District with the administration of the property of the temple. His presence in the Board would naturally help in the proper administration of the temple properties and in that sense, must be treated as valid and proper. This provision is obviously consistent with the State's right of supervision over the management of the temple properties as specified in the Firman of 1934.

Sections 5, 7 and 11 have already been considered by us with particular reference to the possible removal of the Tilkayat under section 7 and its consequences. It may be that in view of the fact that even if the Tilkayat is removed under section 7 (1) (b) and (c) he has to be again nominated to the Board, the Legislature may well have exempted the Tilkayat from the operation of section 7 (1) (b) and (c). That, however, cannot be said to make the said provision invalid in law.

Sections 10 and 35 have been attacked on the ground that they empower the State Government to leave the administration of the temple property to a non-Hindu. It will be noticed that section 10 contemplates that if a Board is dissolved for the reasons specified in it, the Government is required to direct the immediate reconstitution of another Board and that postulates that the interval between the dissolution of one Board and the constitution of a fresh Board would be of a very short duration. If the Legislature thought it necessary to provide for the management of the temple properties for such a short period on an *ad hoc* basis, the provision cannot be seriously challenged. What is true about this provision under section 10, is equally true about the transitional provision in section 35.

A part of section 16 has been struck down by the High Court in so far as it refers to the affairs of the temple. This section authorises the Board to manage the properties and affairs of the temple. The High Court thought that the expression "affairs of the temple" is too wide and may include religious affairs of the temple; and since in managing these affairs of the temple, the section does not require that the management should be according to the customs and usages of the Denomination, it came to the conclusion that the clause "affairs of the temple" is invalid

and should therefore be struck down. We are not satisfied that this view is correct. In the context the expression "affairs of the temple" clearly refers to the purely secular affairs in regard to the administration of the temple. Clearly, section 16 cannot be construed in isolation and must be read along with section 22. That is why it has been left to the Board to manage the properties of the temple as well as the purely secular affairs of the temple, and so, this management need not be governed by the custom and usage of the Denomination. If the expression "affairs of the temple" is construed in this narrow sense as it is intended to be, then there is no infirmity in the said provisions. We may add that the expression "affairs of the temple" has been used in section 28 (1) of the Madras Hindu Religious and Charitable Endowments Act XXII of 1959 in the same sense. Therefore, we would hold that the High Court was in error in striking down the clause "affairs of the temple" occurring in section 16.

The next section to consider is section 21. This section gives to the Board complete power of appointment, suspension, removal, dismissal, or imposition of any other punishment on the officers and servants of the temple or the Board, the Chief Executive Officer being exempted from the operation of this section. It has been urged before us that this section might include even the Mukhia and the Assistant Mukhia who are essentially religious officers of the temple concerned with the performance of religious rites and services to the idols, and the argument is that if they are made the servants of the Board and are not subjected to the discipline of the Tilkayat, that would be contrary to Articles 25 (1) and 26 (2) of the Constitution. In considering this argument, we must have regard to the fact that the Mukhia and the Assistant Mukhia are not only concerned with the religious worship in the temple, but are also required to handle jewellery and ornaments of a very valuable order which are put on the idol and removed from the idol every day, and the safety of the said valuable jewellery is a secular matter within the jurisdiction of the Board. That is why it was necessary that the Board should be given jurisdiction over those officers in so far as they are concerned with the property of a temple. We have no doubt that in working out the Act, the Board will act reasonably and fairly by the Tilkayat and nothing will be done to impair his status or to affect his authority over the servants of the temple in so far as they are concerned with the religious part of the worship in the temple. Since the worship in the temple and the ceremonies and festivals in it are required to be conducted according to the customs and usages of the Denomination by section 16, the authority of the Tilkayat in respect of the servants in charge of the said worship and ceremonies and festivals will have to be respected. It is true that soon after the Act was passed and its implementation began, both Parties appeared to have adopted unhelpful attitudes. We were referred at length to the correspondence that passed between the Tilkayat and the Committee in respect of some of these matters. We do not think it necessary to consider the merits of that controversy because we are satisfied that once the Act is upheld, it will be implemented by the Board consistently with the true spirit of the Act without offending the dignity and status of the Tilkayat as a religious head in charge of the temple and the affairs in matters of religion connected with the temple. Therefore, we do not think it would be right to strike down any part of section 21 as suggested by the learned Attorney-General.

The validity of section 27 has been challenged by the learned Attorney General on the ground that it empowers the State Government to depute any person to enter the premises of the temple, though, in a given case, such a person may not be entitled to make such an entry. Even a non-Hindu person may be appointed by the State Government to inspect the properties of the temple and if he insists upon making an entry into the temple, that would contravene the provisions of Articles 25 (1) and 26 (2) of the Constitution, that is the argument urged in support of the challenge to the validity of section 27. We do not think there is any substance in this argument. All that the section does is to empower the State Government to depute a person to inspect the properties of the temple and its records, correspondence, plans, accounts and other relevant documents. We do not think that

the section constitutes any encroachment of the rights protected by Article 25 (1) or Article 26 (2). If the administration of the properties of the temple has been validly left to the Board constituted under the Act, then the power of inspection is necessarily incidental to the power to administer the properties, and so, in giving the power to the State Government to depute a person to inspect the properties of the temple, no effective complaint can be made against the validity of such a power. The fear expressed by the learned Attorney-General that a non-Hindu may insist upon entering the temple in exercise of the authority conferred on him by the State Government under section 27 is, in our opinion, far-fetched and imaginary. We are satisfied that the power of inspection which the State Government may confer upon any person under section 27 is intended to safeguard the proper administration of the properties of the temple and nothing more. Therefore, we do not think that section 27 suffers from any constitutional infirmity. In this connection, we may add that a similar provision contained in the Madras Religious Endowments Act has been upheld by this Court in the case of *The Commissioner, Hindu Religious Endowments, Madras*¹.

That takes us to section 28 (2) and (3). These two sub-sections have been struck down by the High Court because it thought that they were inconsistent with the view expressed by this Court in the case of *Ratilal Panachand Gandhi*². While discussing the validity of these two sub-sections, the High Court has observed :

“that without entering into an elaborate discussion on the point, we may point out that such provision has been held to be invalid by the Supreme Court in the case of *Ratilal Panachand Gandhi*”

The learned Solicitor-General contends and we think, rightly, that the observations on which the High Court has relied support the validity of the two sub-sections and are inconsistent with the decision of the High Court itself. In the case of *Ratilal Panachand Gandhi*², this Court was dealing with the validity of sections 55 and 56 of the Bombay Public Trusts Act, 1950 (XXIX of 1950). Section 55 of the said Act purported to lay down the rule of *cy pres* in relation to the administration of religious and charitable trust; and section 56 dealt with the powers of the Courts in relation to the said application of *cy pres* doctrine. This Court observed that these two sections purported to lay down how the doctrine of *cy pres* is to be applied in regard to the administration of public trust of a religious or charitable character; and then it proceeded to examine the doctrine of *cy pres* as it was developed by the Equity Courts in England and as it had been adopted by our Indian Courts since a long time past. In the opinion of this Court, the provisions of sections 55 and 56 extended the said doctrine much beyond its recognised limits and further introduced certain principles which ran counter to well established rules of law regarding the administration of charitable trusts. It is significant that what the impugned sections purported to authorise was the diversion of the trust property or funds for purposes which the Charity Commissioner or the Court considered expedient or proper although the original objects of the founder could still be carried out and that was an unwarrantable encroachment on the freedom of religious institutions in regard to the management of their religious affairs. In support of this view, the tenets of the Jain religion were referred to and it was observed that apart from the tenets of the Jain religion, it would be a violation of the freedom of religion and of the right which a religious denomination has, to manage its own affairs in matters of religion, to allow any secular authority to divert the trust money for purposes other than those for which the trust was created. On this view, section 55 (3) which contained the offending provision, and the corresponding provision relating to the powers of the Court occurring in the latter part of section 56 (1) were struck down. In this connection, it is, however, necessary to bear in mind that in dealing with this question, this Court has expressly observed that the doctrine of *cy pres* can be applied where there is a surplus left after exhausting the purposes specified by the settlor. In other words. The decision of this Court in the case of *Ratilal Panachand Gandhi*² cannot be applied to the provisions of section 28 (2) and (3)

1. (1954) 1 M.L.J. 596 : (1954) S.C.J. 335 : 1954 S.C.R. 1005.

2. (1954) 1 M.L.J. 718 : (1954) S.C.J. 480 : (1954) S.C.R. 1055.

which deal with the application of the surplus. In fact, after this decision was pronounced, the relevant provision of the Bombay Act has been amended and the application of the doctrine of *cy pres* is now confined to the surplus available after the purposes of the trust have been dealt with. The High Court has not noticed the fact that section 28 (2) and (3) dealt with the application of the surplus funds and that postulates that these two sub sections can be invoked only if and after the main purposes of the public temple have been duly satisfied. Therefore we hold that the High Court was in error in striking down section 28 (2) and (3) on the ground that they are inconsistent with the decision of this Court in the case of *Ratilal Panachand Gandhi*.¹ We may add that this position was not seriously disputed before us by the learned Attorney General.

The next section is 30 (2) (a). It confers on the State Government the power to make Rules in respect of the qualifications for holding the office of and the allowances payable to the Goswami. This sub-section has been struck down by the High Court and the learned Solicitor-General does not quarrel with the conclusion of the High Court. He has, however, fairly conceded that though the first part of section 30 (2) (a) may be struck down, the latter part need not be struck down. This latter part allows Rules to be framed by the State Government in regard to the allowances payable to the Goswami. We think it is but fair that this part should be upheld so that a proper rule can be made by the State Government determining the quantum of allowances which should be paid to the Goswami and the manner in which it should be so paid. We would therefore strike down the first part of section 30 (2) (a) and uphold the latter part of it which has relation to the allowances payable to the Goswami. The two parts of the said sub-section are clearly severable and so, one can be struck down without affecting the other.

In regard to section 36, the High Court thought that it gives far too sweeping powers to the Government and so, it has struck it down. Section 36 merely empowers the Government to give such directions as may be necessary to carry out the objects of the Act in case a difficulty arises in giving effect to the provisions of the Act. We may, in this connection, refer to the fact that a similar provision is contained in section 36 of the Jagannath Temple Act (Orissa Act XI of 1955). The object of section 36 in the Act is merely to remove difficulties in the implementation of the Act. It is in that sense that the section must be narrowly construed and the scope and ambit of the power conferred on the State Government be circumscribed. If the section is so construed it would not be open to any serious objection. Therefore we are satisfied that the High Court was in error in striking down this section on the ground that the powers conferred on the State Government are too wide.

That takes us to section 37 which has been struck down by the High Court on the ground that it can be utilised as a defence to a suit under section 31. We have already noticed that section 31 empowers a person having an interest to institute a suit for obtaining any of the reliefs specified in clauses (a) to (e) of that section. The High Court thought that section 37 may introduce an impediment against a suit brought by a private individual under section 31. We are satisfied that the High Court was in error in taking this view. All that this section purports to do is to provide for a bar to any suits or proceedings against the State Government for any thing done or purported to be done by it under the provisions of the Act. Such provisions are contained in many Acts, like, for instance, Acts in regard to Local Boards and Municipalities. It is true that section 37 does not require that the act done or purported to be done should be done *bona fide*, but that is presumably because the protection given by section 37 is to the State Government and not to the officers of the State. The effect of the section merely is to save acts done or purported to be done by the State under the provisions of the Act, it cannot impinge upon the rights of a citizen to file a suit under section 31 if it is shown that the citizen is interested within the meaning of section 31 (1). We are inclined to hold that the High Court has, with respect, misjudged the true scope and effect of the provisions

¹ (1954) 1 M.L.J. 718 (1954) S.C.J. 480 (1954) S.C.R. 1055

of section 37 when it struck down the said section as being invalid. We must accordingly reverse the said conclusion of the High Court and uphold the validity of section 37.

The result is that the appeals preferred by the Tilkayat, the Denomination and Ghanshyamlalji fail and are dismissed. So does the writ petition filed by the Tilkayat fail and the same is dismissed. The appeals preferred by the State substantially succeed and the decision of the High Court striking down as *ultra vires* part of section 3 (viii) in relation to the idols of Navnit Priyaji and Madan Mohanlalji; part of section 16 in so far as it refers to the affairs of the temple; section 28 (2) and (3), section 36 and section 37 is reversed. We, however, confirm the decision of the High Court in so far as it has struck down section 30 (2) (a) in regard to the qualifications for holding the office of the Goswami but we reverse its decision in so far as it relates to the latter part of section 30 (2) (a) which deals with the allowances payable to the Goswami. In the circumstances of this case, we direct that parties should bear their own costs throughout.

K.S.

*Appeals by Tilkayat and the Denomination
and Writ Petition dismissed; Appeals by
State allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH,
K.C. DAS GUPTA AND J. C. SHAH, JJ.

Rai Ramkrishna and others etc.

*Appellants**

v.

The State of Bihar (In both the Appeals)

Respondent.

Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act (XVII of 1961), sections 1 (3) and 23 (b)—Prescription of retrospective operation—Legislative competence—If offend Articles 19, and 30½ of the Constitution—Duration of retrospective levy and reasonableness—Constitution of India, 1950—Entries in Schedule VII—Should receive widest denotation—Competence to legislate prospectively and retrospectively—Retrospective levy and Articles 14, 19 and 30½ of Constitution—Taxing statutes—Not beyond pale of Constitutional limitations.

Section 12 of the Bihar Finance Act of 1950 levied a tax on passengers and goods carried on or transported by public service vehicles and public carriers. In 1954, an amending Act was passed and an *Explanation* was added to section 12 of the Act of 1950. Whereas before the amending Act, the owners of public vehicles may have been entitled to raise their fares or freight charges in order to enable them to pay the tax levied under section 12 of the Act of 1950, after the amending Act was passed, they became entitled to recover the specific amounts from passengers and owners of goods by way of tax payable by them under the said section. After the Act as thus amended was struck down by the Supreme Court, an Ordinance was passed and its provisions were included in the impugned Act (Bihar Act XVII of 1961) which ultimately became the law. On the legislative competence of a part of section 23 (b) of the Act prescribing for a retrospective levy of the tax;

Held, If the scheme of section 3 of the Act for the levy and recovery of the tax is valid under Entry 56 of List II so far as future recoveries are concerned, it is not easy to see how it can be said that the character of the tax is radically changed in the present circumstances, because it would be very difficult, if not impossible, for the owner to recover the tax from the passengers whom he had carried in the past.

The incidence of the tax should not be confused with the machinery adopted by the statute to recover the said tax.

If in its essential features a taxing statute is within the legislative competence of the Legislature which passed it by reference to the relevant Entry in the List its character is not necessarily changed merely by its retrospective operation so as to make the said retrospective operation outside the legislative competence of the said Legislature. The challenge to the validity of the retrospective operation of the Act on the ground that the provision in that behalf is beyond the legislative competence of the Bihar Legislature, must be rejected.

The test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test for its validity.

The restrictions imposed by the said retrospective operation must be held to be reasonable and in the public interest under Article 19 (5) and (6) and also reasonable under Article 30½ (b).

The Entries in the Seventh Schedule conferring power on the Legislatures must receive the widest denotation. The legislative power conferred on the appropriate Legislatures to enact law in respect

of the topics covered by the several entries in the three Lists can be exercised both prospectively and retrospectively. It would be open to the party affected by the provision of the Act to contend that the retrospective operation of the Act so completely alters the character of the tax imposed by it as to take it outside the limits of the Entry which gives the Legislature competence to enact the law or it may be open to contend in the alternative that the restrictions imposed by the Act are so unreasonable that they should be struck down on the ground that they contravene his fundamental rights guaranteed under Article 19 (1) (f) and (g). Taxing statutes are not beyond the pale of the constitutional limitations prescribed by Articles 19 and 14. The test of reasonableness prescribed by Article 304 (b) is justiciable.

Appeals by Special Leave from the Judgment and Order dated 5th September, 1962, of the Patna High Court in Misc. Judl. Cases Nos. 916 and 918 of 1961.

M. C. Setalvad, Senior Advocate, (*B. K. P. Sinha*, *A. N. Sinha* and *B. P. Jha*, Advocates, with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate, (*Anil Kumar Gupta*, Advocate and *D. P. Singh*, *M. K. Ramamurthi*, *R. K. Garg* and *S. C. Agarwala*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question which these two appeals raise for our decision is in regard to the validity of the retrospective operation of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 (XVII of 1961) (hereinafter called 'the Act'). It is true that the two writ petitions Nos. 916 of 1961 and 918 of 1961 filed by the appellants *Rai Ramkrishna* and others and *Messrs. Road Transport Co., Dhanbad* and others respectively in the High Court at Patna along with 18 others under Articles 226 and 227 of the Constitution had challenged the validity of the whole of the Act. The High Court has held that the Act is valid both in its prospective as well as its retrospective operation. In their appeals brought to this Court by Special Leave against the said judgment, the appellants do not challenge the conclusion of the High Court that the Act is valid in so far as its prospective operation is concerned, they have confined their appeals to its retrospective operation. Eighteen other petitioners who had joined the appellants in the High Court have accepted the decision of the High Court and have not come to this Court in appeal.

Before dealing with the points raised by the appellants, it is necessary to set out briefly the background of the present dispute. On 30th March, 1950, the Bihar Legislature passed the Bihar Finance Act, 1950 (Bihar Act XVII of 1950). This Act levied a tax on passengers and goods carried by public service motor vehicles in Bihar. Nearly a year after this Act came into force, the appellants challenged its validity by instituting a suit No. 60 of 1951 in the Court of the First Subordinate Judge at Gaya on 5th May, 1951. In this suit, the appellants prayed that the provisions of Part III of the said Act were unconstitutional and asked for an injunction restraining the respondent, the State of Bihar, from levying and realising the said tax. It appears that a similar suit was instituted (No. 47 of 1951) on behalf of the passengers and owners of goods for obtaining similar reliefs against the bus operators. This latter suit was filed by the passengers and owners of goods in a representative capacity under Order 1, rule 8. Both these suits were transferred to the Patna High Court for disposal. A Special Bench of the High Court which heard the said two suits dismissed them on 8th May, 1952. The High Court found that the said Act of 1950 did not contravene Article 301 of the Constitution and so, its validity was beyond challenge. The appellants then preferred an appeal to this Court No. 53 of 1952. Pending the said appeal in this Court, a similar question had been decided by this Court in the case of *Atiabari Tea Co., Ltd. v. The State of Assam and others*¹. In consequence, when the appellant's appeal came for disposal before this Court, it was conceded by the respondent that the said appeal was covered by the decision of this Court in the case of *Atiabari Tea Co., Ltd.*¹, and that in accordance with the said decision, the appeal had to be allowed. That is why the appeal was allowed and the appellants were granted the declaration and injunction claimed by them in their suit. This judgment was pronounced on the 12th December, 1960.

The respondent then issued an Ordinance (Bihar Ordinance II of 1961) on 1st August, 1961. By this Ordinance, the material provisions of the earlier Act of 1950 which had been struck down by this Court were validated and brought into force retrospectively from the date when the earlier Act had purported to come into force. Subsequently, the provisions of the said Ordinance were incorporated in the Act which was duly passed by the Bihar Legislature and received the assent of the President on 23rd September, 1961. As a result of the retrospective operation of this Act, its material provisions are deemed to have come into force on 1st April, 1950, that is to say, the date on which the earlier Act of 1950 had come into force. That, in brief, is the background of the present legislation.

The appellants and the other petitioners who had joined by filing several petitions in the Patna High Court had challenged the validity of the Act on several grounds. The High Court has rejected all these grounds and has taken the view that the Act in its entirety is valid. The High Court has found that the provisions of the Act no doubt take it within the purview of Part XIII of the Constitution; but it has held that the Act has been passed with the previous sanction of the President and the restrictions imposed by it are otherwise reasonable, and so, it is saved under Article 304 (b) of the Constitution. The plea made by the respondent that the taxing provisions of the Act were compensatory in character and were, therefore, valid, was rejected by the High Court. The High Court held that the principle that a taxing statute which levies a compensatory or regulatory tax is not invalid which has been laid down by the majority decision of this Court in the case of *The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan*¹, was not applicable to the provisions of the Act. The argument that the Act was invalid because it required the appellants to act as the agents of the respondent for collecting the tax from the passengers and from the owners of the goods without payment of any remuneration, was rejected by the High Court. It was also urged that the Act contravened the provisions of Article 199 (4) of the Constitution, but the High Court was not impressed with this argument; and the plea that the matters in dispute between the appellants and the respondent are really concluded by *res judicata*, appeared to the High Court to be without any substance. That is how the writ petitions filed by the appellants failed, and so, they have come to this Court confining their challenge only to the validity of the retrospective operation of the Act.

At this stage, it is necessary to refer to the material provisions of the earlier Acts and examine the scheme of the Act impugned. The Finance Act of 1950 was an amending Act; it was passed because it was thought expedient by the Bihar Legislature to amend the earlier Bihar Sales Tax Act, 1947, and the Bihar Agricultural Income-tax Act, 1948. Section 12 of the said Act levied a tax on passengers and goods carried or transported by public service vehicles and public carriers. Section 12 (1) prescribed the rate of the said taxation at As. -/2/- in a rupee on all fares and freights payable to owners of such motor cabs, stage carriages, contract carriages or public carriers, as carried the goods and passengers in question. Sub-section (2) dealt with the cases where any fare or freight was charged in a lump sum either for carrying goods or by way of contribution for a season ticket, or otherwise; and sub-section (3) provided that every owner of the public vehicle shall pay into the Government Treasury the full amount of the tax due from him under sub-section (1) or sub-section (2) in such a manner and at such intervals as may be prescribed and shall furnish such returns by such dates and to such authority as may be prescribed.

In 1954, an amending Act was passed (Bihar Act XI of 1954), and section 14 of this amending Act added an *Explanation* to section 12 of the Act of 1950. By this *Explanation*, every passenger carried by the public vehicle and every person whose goods were transported by a public carrier was made liable to pay to the owner of the said carrier the amount of tax payable under sub-sections (1) and (2) of section 12, and every owner of the vehicle or carrier was authorised to recover

such tax from such passenger or person. In other words, whereas before the passing of the amending Act, the owners of public vehicles may have been entitled to raise their fares or freight charges in order to enable them to pay the tax levied under section 12 of the Act of 1950, after the amending Act was passed, they became entitled to recover the specific amounts from passengers and owners of goods by way of tax payable by them under the said section.

After the Act as thus amended was struck down by this Court on 12th December, 1960, an Ordinance was passed and its provisions were included in the impugned Act which ultimately became the law in Bihar on 25th September, 1961. The Act consists of 26 sections. Section 1 (3) expressly provides that the Act shall be deemed to have come into force on the first day of April, 1950. Section 2 defines, *inter alia*, goods, owner, passenger and public service motor vehicle. Section 3 is the charging section. Section 3 (1) provides that on and from the date on which this Act is deemed to have come into force under sub-section (3) of section 1, there shall be levied and paid to the State Government a tax on all passengers and goods carried by a public service motor vehicle. Then the sub-section prescribes the rate at which the said tax has to be paid. There is a proviso to this sub-section which it is unnecessary to set out. Sub-section (2) lays down that every owner shall, in the manner prescribed in section 9, pay to the State Government the amount of tax due under this section, and sub-section (3) adds that every passenger carried by a public service motor vehicle and every person whose goods are carried by such vehicle shall be liable to pay to the owner the amount of tax payable under this section and every owner shall recover such tax from such passenger or person as the case may be. There are three more sub-sections to this section which need not detain us. It would be noticed that the effect of section 3 is that the passengers and the owners of goods are made liable to pay the tax to the owner of the public service motor vehicle and the latter is made liable to pay the tax to the State Government and both these provisions act retrospectively by virtue of section 1 (3). In other words the tax is levied on passengers and goods carried by the public vehicles and the machinery devised is that the tax would be recovered from the owners of such vehicles. Section 4 requires the owners of public service motor vehicles to register their vehicles. Under section 5 security has to be furnished by such owners, and returns have to be submitted under section 6. Section 7 deals with the procedure for the assessment of tax. Section 8 provides for the payment of fixed amount in lieu of tax, and under section 9 provision is made for the payment and recovery of tax. Section 10 deals with the special mode of recovery. Section 11 deals with cases of transfer of public service motor vehicle and makes both the transferor and the transferee liable for the tax as prescribed by it. Refund is dealt with by section 12, and appeal, revision and review are provided by sections 13, 14 and 15 respectively. Under section 16, power is given subject to such rules as may be made by the State Government, to the Commissioner or the prescribed authority to secure the production, inspection and seizure of accounts and documents and search of premises and vehicles. Section 17 makes the Commissioner and the prescribed authority public servants, and section 18 deals with offences and penalties. Section 19 deals with compounding of offences. Section 20 prescribes the usual bar to certain proceedings, and section 21 refers to the limitation of certain suits and prosecutions. Section 22 confers power on the State Government to make Rules. Section 23 is important. In effect, it provides that the acts done under Bihar Act XVII of 1950 shall be deemed to have been done under this Act. It reads thus —

Notwithstanding any judgment, decree or order of any Court, tribunal or authority—

(a) any amount paid, collected or recovered or purported to have been paid, collected or recovered as tax or penalty under the provisions of Part III of the Bihar Finance Act 1950 (Bihar Act XVII of 1950) as amended from time to time (hereinafter referred to as the said Act) or the Rules made thereunder during the period beginning with the first day of April 1950 and ending on the thirty first day of July 1961 shall be deemed to have been validly levied, paid, collected or recovered under the provisions of this Act, and

(b) any proceeding commenced or purported to have been commenced for the assessment, collection for recovery of any amount as tax or penalty under the provisions of the said Act or the Rules made thereunder during the period specified in clause (a) shall be deemed to have been commenced and conducted in accordance with the provisions of this Act, and, if not already completed, shall be continued and completed in accordance with the provisions of this Act."

There is a proviso to this section which is not relevant for our purpose. Sections 24 and 25 deal with repeals and savings; and section 26 provides that if any difficulty arises in giving effect to the provisions of the Act, the State Government may pass an order in that behalf, subject to the limitations prescribed by the said section. That, broadly stated, is the scheme of the Act.

In order to appreciate the merits of the contentions raised by Mr. Setalvad on behalf of the appellants, it is necessary to specify clearly the limited character of the controversy between the parties in appeal. The appellants concede that the Act in its prospective operation is perfectly valid. They also concede that section 23 (a) which validates the acts done under the earlier Act of 1950 is valid. It would be noticed that apart from the general retrospective operation of the Act for which a provision has been made by section 1 (3) section 23 itself makes a clear retrospective validating provision, and it is not disputed that the acts validated by section 23 (a) have been properly validated. With regard to the validating provision contained in section 23 (b), it has been urged that the said provision in so far as it refers to proceedings commenced under the earlier Act but not completed before the impugned Act came into force is invalid. The rest of the provisions of section 23 (b) are also not challenged. In other words, it is not disputed that in its prospective operation, the Act has been validly passed by the Bihar Legislature exercising its legislative power under Entry 56 in List II of the Seventh Schedule of the Constitution. The argument, however, is that its retrospective operation prescribed by section 1 (3) and by a part of section 23 (b) so completely alters the character of the tax proposed to be retrospectively recovered that it introduces a serious infirmity in the legislative competence of the Bihar Legislature itself. Alternatively, it is argued that the said retrospective operation is so unreasonable that it cannot be saved either under Article 304 (b) or Article 19 (5) and (6). It is these two narrow points which call for our decision in the present appeals.

In dealing with this controversy, it is necessary to bear in mind some points on which there is no dispute. The entries in the Seventh Schedule conferring legislative power on the Legislatures in question must receive the widest denotation. This position is not disputed. Entry 56 of the Second List refers to taxes on goods and passengers carried by road or on inland waterways. It is clear that the State Legislatures are authorised to levy taxes on goods and passengers by this entry. It is not on all goods and passengers that taxes can be imposed under this entry; it is on goods and passengers carried by road or on inland waterways that taxes can be imposed. The expression "carried by road or on inland waterways" is an adjectival clause qualifying goods and passengers, that is to say, it is goods and passengers of the said description that have to be taxed under this entry. Nevertheless, it is obvious that the goods as such cannot pay taxes, and so, taxes levied on goods have to be recovered from some persons, and these persons must have an intimate or direct connection or nexus with the goods before they can be called upon to pay the taxes in respect of the carried goods. Similarly, passengers who are carried are taxed under the entry. But, usually, it would be inexpedient, if not impossible, to recover the tax directly from the passengers and so, it would be expedient and convenient to provide for the recovery of the said tax from the owners of the vehicles themselves. That is why it is not disputed by Mr. Setalvad that in enacting a law under Entry 56 in respect of taxes imposed on passengers carried by road or on inland waterways, it would be perfectly competent to the Legislature to devise a machinery for the recovery of the said tax by requiring the bus operators or bus owners to pay the said tax.

The other point on which there is no dispute before us is that the legislative power conferred on the appropriate Legislatures to enact law in respect of topics

covered by the several entries in the three Lists can be exercised both prospectively and retrospectively. Where the Legislature can make a valid law, it may provide not only for the prospective operation of the material provisions of the said law, but it can also provide for the retrospective operation of the said provisions. Similarly, there is no doubt that the legislative power in question includes the subsidiary or the auxiliary power to validate laws which have been found to be invalid. If a law passed by a Legislature is struck down by the Courts as being invalid for one infirmity or another, it would be competent to the appropriate Legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed. This position is treated as firmly established since the decision of the Federal Court in the case of *The United Provinces v Mst Atiga Begum and others*¹.

It is also true that though the Legislature can pass a law and make its provisions retrospective, it would be relevant to consider the effect of the said retroactive operation of the law both in respect of the legislative competence of the Legislature and the reasonableness of the restrictions imposed by it. In other words, it may be open to a party affected by the provisions of the Act to contend that the retrospective operation of the Act so completely alters the character of the tax imposed by it as to take it outside the limits of the entry which gives the Legislature competence to enact the law or, it may be open to it to contend in the alternative that the restrictions imposed by the Act are so unreasonable that they should be struck down on the ground that they contravene his fundamental rights guaranteed under Article 19 (1) (f) and (g). This position cannot be, and has not been, disputed by Mr Sastri who appears for the respondent, *vide The State of West Bengal v Subodh Gopal Bose and others*², and *Express Newspapers (Private) Ltd and another v The Union of India and others*³.

In view of the recent decisions of this Court Mr Sastri also concedes that taxing statutes are not beyond the pale of the constitutional limitations prescribed by Articles 19 and 14, and he also concedes that the test of reasonableness prescribed by Article 304 (b) is justiciable. It is, of course, true that the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the Legislature can be taxed by the Legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the condemnation raised by a citizen that the taxing statute contravenes Article 19, Courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes. This is illustrated by the decision of this Court in the case of *Kunnathal Thathuni Moopil Nair etc v State of Kerala and another*⁴, where a taxing statute was struck down because it suffered from several fatal infirmities. On the other hand, we may refer to the case of *Raja Jagannath Baksh Singh v State of Uttar Pradesh and another*⁵, where

¹ (1933-40) F.L.J. (F.C.) 97 (1941) 1 M.L.J. (Sup.) 65 (1940) F.C.R. 110 A.I.R. 1941 F.C. 16

at page 139

⁴ (1961) 2 S.C.J. 269 A.I.R. 1961 S.C. 552

⁵ A.I.R. 1962 S.C. 1,663

² (1954) S.C.R. 587 at page 626

³ (1958) S.C.J. 1113, (1959) S.C.R. 12

a challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed that unless the infirmities in the impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power, the Court would uphold a taxing statute.

It is in the light of these principles of law which are not in dispute between the parties before us that we must proceed to examine the arguments urged by Mr. Setalvad in challenging the validity of the retrospective operation of the Act. Mr. Setalvad contends that one has merely to read the provisions of section 3 (3) to realise that the character of the tax has been completely altered by its retrospective operation. It would be recalled that section 3 (3), *inter alia*, provides that every passenger carried by a public service motor vehicle shall be liable to pay to the owner thereof the amount of tax payable under the said sub-section because the scheme of the Act is that the tax is paid by the passenger to the owner and by the owner to the State; and both these provisions are retroactive. However, in respect of passengers carried by the owner between 1st April, 1950 and the date of the Act, how can the owner recover the tax he is now bound to pay to the State, asks Mr. Setalvad? *Prima facie*, the argument appears to be attractive, but a closer examination would show that the difficulty which the owner may experience in recovering the tax from the passengers will not necessarily alter the character of the tax. If the scheme of section 3 for the levy and recovery of the tax is valid under Entry 56 of List II so far as future recoveries are concerned, it is not easy to see how it can be said that the character of the tax is radically changed in the present circumstances, because it would be very difficult, if not impossible, for the owner to recover the tax from the passengers whom he has carried in the past. The tax recovered retrospectively like the one which will be recovered prospectively still continues to be a tax on passengers and it adopts the same machinery for the recovery of the tax both as to the past as well as to the future. In this connection, we ought to bear in mind that the incidence of the tax should not be confused with the machinery adopted by the statute to recover the said tax. Besides, as we will point out later, it is only during a comparatively short period that the owners' difficulties assume a significant form. Stated generally, it may not be unreasonable to assume that from the time when the Act of 1950 was brought into force it was known to all the owners that the Legislature had imposed a tax in respect of passengers and goods carried by them and since then, and particularly after the amendment of 1954, they may have raised their fares and freights to absorb their liability to pay the tax to the State. But apart from that, it seems to us that the nature of the tax in the present case is the same both in regard to prospective and retrospective operations, and so, it is difficult to entertain the argument that the tax has ceased to be a tax on passengers and is, therefore, outside Entry 56. The argument that the retrospective operation of the Act is beyond the legislative competence of the Bihar Legislature must, therefore, be rejected. In this connection, we cannot ignore the fact that prior to the passing of the impugned Act there was in operation a similar statute since 1st April, 1950 which was struck down as unconstitutional on the ground of want of assent of the President. This aspect of the matter, no doubt, will have to be further examined in the context of the appellants' case that the retrospective operation of the Act introduces a restriction which is unreasonable both under Article 19 (1) (f) and (g) and Article 304 (b); but it has no validity in challenging the legislative competence of the Bihar Legislature in that behalf.

We may, in this connection, incidentally refer to some decisions of this Court where a similar argument was urged in regard to the retrospective operation of some Acts. It appears that in those cases, the argument proceeded on a distinction between direct and indirect taxes. It is well-known that John Stuart Mill made a pointed distinction between direct and indirect taxation and this distinction was reflected in section 92 (II) of the British North America Act which gave to the Legislatures of the Provinces exclusive power to make laws in relation to direct taxation within the Province. No such distinction can be made in regard to the legislative power conferred on the appropriate Legislatures by the respective entries

in the Seventh Schedule of our Constitution, and so, it is unnecessary for us to consider any argument based on the said distinction in the present case. However, this argument was urged before this Court in challenging the validity of some Acts by reference to their retrospective operation. In the *Tata Iron and Steel Co., Ltd v The State of Bihar*¹, where this Court was called upon to examine the validity of the Bihar Sales Tax Act, 1947, as amended by the Amendment Act of 1948, one of the points urged before this Court was that whereas sales tax is an indirect tax on the consumer inasmuch as the idea in imposing the said tax on the seller is that he should pass it on to his purchaser and collect it from him, the retrospective operation of the Act made the imposition of the said tax a direct tax on the seller and so, it was invalid. This argument was rejected. A similar objection against the retrospective operation of the Madras General Sales Tax Act, 1939, as adopted to Andhra by the Sales Tax Laws Validation Act, 1956, was rejected in the case of *M P V Sundararamer & Co v The State of Andhra Pradesh and another*².

In *Messrs J K Jut Mills Co, Ltd v State of Uttar Pradesh and another*³, the argument that the character of the sales tax as enacted by the U P Sales Tax Act, 1948, was radically altered in its retrospective operation, was likewise rejected. The same argument in respect of an excise tax raised before this Court in the case of *Messrs Chhotabhai Jethabhai Patel & Co v Union of India and others*⁴ was for similar reasons rejected. The position, therefore, appears to be well settled that if in its essential features a taxing statute is within the legislative competence of the Legislature which passed it by reference to the relevant entry in the List, its character is not necessarily changed merely by its retrospective operation so as to make the said retrospective operation outside the legislative competence of the said Legislature, and so, we must hold that the challenge to the validity of the retrospective operation of the Act on the ground that the provision in that behalf is beyond the legislative competence of the Bihar Legislature, must be rejected.

That takes us to the question as to whether the restriction imposed on the appellants' right under Article 19 (1) (f) and (g) by the retrospective operation of the Act is reasonable so as to attract the provisions of Article 19 (5) and (6). The same question arises in regard to the test of reasonableness prescribed by Article 304 (b). Mr Setalvad contends that since it is not disputed that the retrospective operation of a taxing statute is a relevant fact to consider in determining its reasonableness, it may not be unfair to suggest that if the retrospective operation covers a long period like ten years, it should be held to impose a restriction which is unreasonable and as such, must be struck down as being unconstitutional. In support of this plea, Mr Setalvad has referred us to the observations⁵ made by Sutherland "Tax statutes", says Sutherland,

'may be retroactive if the Legislature clearly so intends. If the retroactive feature of a law is arbitrary and burdensome, the statute will not be sustained. The reasonableness of each retroactive tax statute will depend on the circumstances of each case. A statute retroactively imposing a tax on income earned between the adoption of an amendment making income taxes legal and the passage of the Income-tax Act is not unreasonable. Likewise an income tax not retroactive beyond and year of its passage is clearly valid. The longest period of retroactivity yet sustained has been three years. In general, income taxes are valid although retroactive, if they affect prior but recent transactions.'

Basing himself on those observations, Mr Setalvad contends that since the period covered by the retroactive operation of the Act is between the 1st April, 1950 and the 25th September, 1961, it should be held that the restrictions imposed by such retroactive operation are unreasonable, and so, the Act should be struck down in regard to its retrospective operation.

1 (1958) S.C.J. 818 1958 S.C.R. 1355 at 1534
p. 1377

2 (1958) S.C.J. 459 (1958) 1 A.L.J. 179 (S.C.) 179 (1958) 1 M.L.J. (S.C.) 179 1958 S.C.R. 1422

3 (1963) 1 S.C.J. 127 A.I.R. 1961 S.C.

4 A.I.R. 1962 S.C. 1006

5 Sutherland on Statutes and Statutory Construction, 1943 Ed., Vol. 2, para 2211 pp. 131 133

We do not think that such a mechanical test can be applied in determining the validity of the retrospective operation of the Act. It is conceivable that cases may arise in which the retrospective operation of a taxing or other statute may introduce such an element of unreasonableness that the restrictions imposed by it may be open to serious challenge as unconstitutional; but the test of the length of time covered by the retrospective operation cannot, by itself, necessarily be a decisive test. We may have a statute whose retrospective operation covers a comparatively short period and yet it is possible that the nature of the restriction imposed by it may be of such a character as to introduce a serious infirmity in the retrospective operation. On the other hand, we may get cases where the period covered by the retrospective operation of the statute, though long, will not introduce any such infirmity. Take the case of a Validating Act. If a statute passed by the Legislature is challenged in proceedings before a Court, and the challenge is ultimately sustained and the statute is struck down, it is not unlikely that the judicial proceedings may occupy a fairly long period and the Legislature may well decide to await the final decision in said proceedings before it uses its legislative power to cure the alleged infirmity in the earlier Act. In such a case, if after the final judicial verdict is pronounced in the matter the Legislature passes a Validating Act, it may well cover a long period taken by the judicial proceedings in Court and yet it would be inappropriate to hold that because the retrospective operation covers a long period, therefore, the restriction imposed by it is unreasonable. That is why we think the test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test.

Take the present case. The earlier Act was passed in 1950 and came into force on the 1st of April, 1950, and the tax imposed by it was being collected until an order of injunction was passed in the two suits to which we have already referred. The said suits were dismissed on the 8th May, 1952, but the appeals preferred by the appellants were pending in this Court until the 12th December, 1960. In other words, between 1950 and 1960 proceedings were pending in Court in which this validity of the Act was being examined, and if a Validating Act had to be passed, the Legislature cannot be blamed for having awaited the final decision of this Court in the said proceedings. Thus, the period covered between the institution of the said two suits and their final disposal by this Court cannot be pressed into service for challenging the reasonableness of the retrospective operation of the Act.

It is, however, urged that the retrospective operation of the Act during the period covered by the orders of injunction issued by the trial Court in the said two suits must be held to be unreasonable, and the argument is that in regard to the said period the retrospective operation should be struck down. Similarly, it is urged that the said retrospective operation should be struck down for the period between 12th December, 1960, when this Court struck down the earlier Act and 1st August, 1961 when Ordinance II of 1961 was issued. We do not think it would be appropriate in the present case to examine the validity of the retrospective operation by reference to particular periods of time covered by it in the manner suggested by Mr. Setalvad; and so, we are not prepared to accept his argument that the retrospective operation of the Act is invalid so far as the period between 12th December, 1960, when the earlier Act was struck down by this Court, and the 1st August, 1961, when the Ordinance was issued, is concerned. It would be realised that in such a situation there would always be some time lag between the date when a particular Act is struck down as unconstitutional, and the date on which a retrospective Validating Act is passed. Besides, the circumstances under which the orders of injunction were passed by the trial Court cannot be altogether ignored. Mr. Sastri contends that the two suits filed by the appellants and the passengers and the owners of goods respectively disclose a common design and can be treated as friendly suits actuated by the same motive, and we do not think that this contention can be rejected as wholly unjustified. Apart from it, when the injunction was issued against the respondent in the appellants' suit, the appellants gave an undertaking in writing to pay the taxes payable on the fares and freights as provided by

the law in case their suit failed. As we have already seen, their suit was dismissed by the High Court on 8th May, 1952, so that it was then open to the respondent to call upon the appellants to pay the taxes for the period covered by the orders of injunction and to require them to pay future taxes because the earlier Act under which the taxes were recovered was held to be valid by the High Court. It is no doubt suggested by Mr. Setalvad that the spirit of the undertaking required that no recovery should be made until the final disposal of the proceedings between the parties. We do not see how this argument about the spirit of the undertaking can avail the appellants. As soon as their suit against the respondent was dismissed, the respondent was at liberty to enforce the provisions of the Act and the dismissal of the suit made it possible for the respondent to claim the taxes even for the period covered by the order of injunction. We do not think that in the context, the dismissal of the suit can legitimately refer to the final disposal of the appeal filed by the appellants before this Court. In any event, having regard to the genesis of the two suits, the nature of the orders of injunction issued in them and the character of the undertaking given by the appellants, we do not think it would be possible to sustain Mr. Setalvad's argument that for the period of the injunction the retrospective operation of the Act should be held to be invalid.

In this connection, it would be relevant to refer to another fact which appears on the record. Along with the appellants, 18 other bus owners had filed writ petitions challenging the validity of the Act. These petitioners have not appealed to this Court presumably because their cases fall under the provisions of section 23 (a) of the Act. It is likely that they had paid the amounts, and since the amounts paid under the provisions of the earlier Act are now deemed to have been paid under the provisions of this Act, they did not think it worthwhile to come to this Court against the decision of the High Court. Apart from that, it is not unlikely that other bus owners may have made similar payments and the appellants have, therefore, come to this Court because they have made no payments and so, their cases do not fall under section 23 (a), or may be, their cases fall under section 23 (b). The position, therefore, is that the retrospective operation of section 23 (a) and (b) cover respectively cases of payments actually made under the provisions of the earlier Act, and cases pending inquiry and the retrospective operation of section 3 (3) read with section 1 (3) only applies to cases of persons who did not pay the tax during the whole of the period, or whose cases were not pending, and it is this limited class of persons whose interests are represented by the appellants before us. Having regard to the somewhat unusual circumstances which furnish the background for the enactment of the impugned statute, we do not think that we could accept Mr. Setalvad's argument that the retrospective operation of the Act imposes restrictions on the appellants which contravene the provisions of Article 19 (1) (f) and (g). In our opinion, having regard to all the relevant facts of this case, the restrictions imposed by the said retrospective operation must be held to be reasonable and in the public interest under Article 19 (5) and (6) and also reasonable under Article 304 (b).

There is only one more point to which reference must be made. We have already noticed that the High Court has rejected the argument urged on behalf of the State that the tax imposed by the Act is of a compensatory or regulatory character and therefore, is valid. Mr. Saxtri wanted to press that part of the case of the State before us. He urged that according to the majority decision of this Court in the case of the *Automobile Transport (Rajasthan), Ltd.*¹, it must now be taken to be settled that

¹regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304 (b) of the Constitution. (page 1424)

On the other hand, Mr. Setalvad has argued that this doctrine of compensatory or regulatory taxation which is mainly based on Australian decisions cannot be extended to the present case, and he contends that if the doctrine of regulatory or

compensatory taxes is very liberally construed, it would tend to cover all taxes, because in a loose sense, all taxes raised by the State can ultimately be said to be compensatory in a far-fetched manner, and in that way, the well-recognised constitutional difference between a tax and a fee will be obliterated and the provisions of Part XIII of the Constitution will lose all their significance. Part XIII contains provisions which constitute a self-contained Code and we need not really travel outside the said provisions in determining the validity of the tax imposed by the Act. Since we have come to the conclusion that the challenge to the validity of the retrospective operation of the Act cannot be sustained, we do not think it necessary to pursue this matter any further.

In the result, the appeals fail and are dismissed with costs.

V.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Municipal Council, Palai, through the Commissioner of Municipal Council, Palai (In all the appeals)

*Appellant**

v.

T. J. Joseph and others

Respondents.

Interpretation of Statutes—Doctrine of implied repeal of earlier statute by later statute—Scope and nature of Travancore District Municipalities Act (XXIII of 1116 M.E. (corresponding to A.D. 1941), sections 286 and 287—If repealed by Travancore-Cochin Motor Vehicles Act, 1125 M.E. (corresponding to A.D. 1950), section 72.

It is undoubtedly true that the Legislature can exercise the power of repeal by implication. But it is an equally well-settled principle of law that there is a presumption against an implied repeal. Upon the assumption that the Legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course the presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together.

For implying a repeal another thing to be considered is whether the two statutes relate to the same subject-matter and have the same purpose.

The third question to be considered is whether the new statute purports to replace the old one in its entirety or only partially. The further question which is to be considered is whether there is repugnancy between the old and new law.

Another question to be considered is whether a general statute repeals a special and local statute. A general statute applies to all persons and localities within its jurisdiction and scope as distinguished from a special one which in its operation is confined to a particular locality, and, therefore, where it is doubtful whether the special statute was intended to be repealed by the general statute, the Court should try to give effect to both the enactments as far as possible.

In the instant case it seems however clear that bearing in mind the fact that the provisions of section 72 of the Travancore-Cochin Motor Vehicles Act were intended to apply to a much wider area than those of sections 286 and 287 of the Travancore District Municipalities Act, it cannot be said that section 72 of the Travancore-Cochin Motor Vehicles Act was intended to replace those provisions of the Travancore District Municipalities Act. The intention of the Legislature appears to be to allow the two sets of provisions referred above to co-exist because both are enabling ones.

Appeals by Special Leave from the Judgment and Order dated 18th November, 1959 of the Kerala High Court in O.P. Nos. 579, 580 and 647 of 1959.

M. U. Isaac, Girish Chandra and Sardar Bahadur, Advocates, for Appellant.

The Judgment of the Court was delivered by

Mudholkar, J.—The Municipal Council, Palai, the appellant before us, passed a resolution on 12th September, 1958, providing for the use from 1st October, 1958, of a public busstand constructed by it for stage carriage buses starting from and returning to the municipal limits of Palai or passing through its limits. A fee of Re. 1 per day was to be charged on every such bus and 50 nP. per day on buses which merely pass through the municipal limits. The resolution also prohibited the use

after that date of any other public place or the sides of any public street within Palai Municipal limits as a bus stand or a halting place. At the request of the bus operators the Municipal Council, by a resolution, dated 24th September, 1958, reduced the rates from Re 1 to 80 nP. per day and from 50 nP. to 40 nP. per day. By a further resolution dated 22nd November, 1959, the Municipal Council modified the resolution of 12th September, 1958, and instead imposed a prohibition on using as a bus stand or halting place a public place or side of a public road within a radius of six furlongs from the Municipal bus stand. Some of the operators who were using that bus stand did not pay the charges due from them for the use of the bus stand. Demand notices were, therefore, issued against them. The respondent in this appeal, Joseph, as well as the respondents in the other two appeals, Anthony and Eapen who were recipients of such notices preferred writ petitions before the High Court of Kerala challenging the validity of the action taken by the Municipal Council and praying for quashing of the demand notices issued against them.

It may be mentioned that the various resolutions of the Municipal Council to which we have adverted were passed by it in exercise of the powers conferred upon it by sections 286 and 287 of the Travancore District Municipalities Act, XXIII of 1116 M.E. (which corresponds to A.D. 1941). Those provisions read thus :

' 286 (1) The municipal council may construct or provide public landing places halting places and cart stands and may levy fees for the use of the same.

(2) A statement in English and a language of the district of the fees fixed by the Council for the use of such place shall be put up in a conspicuous part thereof.

Explanation—A cart stand shall, for the purposes of this Act include a stand for carriages and animals.

287 Where a municipal council has provided a public landing place halting place or cart stand the executive authority may prohibit the use for the same purpose by any person within such distance thereof as may be determined by the municipal council, of any public place or the sides of any public street.'

The reason given by the Municipal Council for taking action under these provisions is that about 80 stage carriage buses start, halt in, or pass through the municipal limits of Palai and the members of the public using them were being put to serious inconveniences for want of a proper waiting room and other necessary conveniences. Further, the unsystematic manner in which the buses were parked and plied affected the sanitation of the town. In order to improve matters the Municipal Council claims to have utilised a plot of land worth Rs. 50,000 located almost at the centre of the town and constructed a bus stand at a cost of Rs. 80,000 wherein, among other things, it has provided separate waiting rooms for men and women, sitting accommodation, electric fans, sanitary conveniences, drinking water, etc., as also garages and booking offices free of cost for bus operators using the bus stand. It is claimed on behalf of the Municipal Council that by establishing the bus stand it has not only acted within the scope of the powers conferred by the Act but also in public interest and for preserving the health and sanitation of the town.

On behalf of the respondents it was contended that the provisions of sections 286 and 287 of the Travancore District Municipalities Act stood repealed by implication by virtue of the provisions of section 72 of the Travancore Cochin Motor Vehicles Act, 1125 M.E. (corresponding to A.D. 1950) which came into force on 5th January, 1950. That section reads as follows:

' Government or any authority authorised in this behalf by the Government may in consultation with the local authority having jurisdiction in the area concerned, determine places at which motor vehicles may stand either indefinitely or for a specified period of time, and may determine the places at which public service vehicles may stop for a longer time than is necessary for the taking up and setting down of passengers.'

Incidentally we may mention that this section continued in force until the Travancore-Cochin Motor Vehicles Act was replaced partially by the Motor Vehicles Act, 1939 (Central Act IV of 1939) on its extension to Travancore-Cochin by Part B States (Laws) Act, 1951 (Central Act III of 1951). The Central Act of course has no bearing upon the argument advanced before us because in fact sections 286 and

287 were repealed by implication by section 72 of the Travancore-Cochin Motor Vehicles Act the effect of the partial replacement of the Travancore-Cochin Motor Vehicles Act by the Central Motor Vehicles Act does not fall to be considered.

The High Court accepted the contention urged by the respondents in these three appeals and observed :

"The T. C. Motor Vehicles Act, 1125 was enacted, as the Preamble shows, in order to provide 'a uniform law relating to motor vehicles' and we see no reason why sections like 286 and 287 to the extent they militate against such uniformity should not be considered as having been repealed by implication."

In support of their conclusion they have placed reliance upon certain decisions. The first of these decisions is *Daw, Clerk of the Commissioners of Sewers of the City of London v. The Metropolitan Board of Works*¹. The High Court quoted the following observations of Erle, C.J., as supporting its conclusion :

"I think that where the same power is given in two different bodies to number houses, the exercise of these powers concurrently by both bodies would be entirely destructive of the object for which they were conferred ; they cannot, therefore, exist together, and in accordance with general principles, the power more recently conferred overrides that which was conferred by the prior Act."

That was a case where action had been brought by a Clerk of the Commissioners of Sewers of the City of London against the Metropolitan Board of Works for recovery of damages resulting from the defacement of numbers of houses by the Metropolitan Board of Works from houses in Fann Street, Aldersgate. Those numbers had been inscribed by the Commissioners of Sewers by virtue of the powers conferred upon them by the City of London Sewers Act, 1848, with regard to the sanitation and management of the City of London. The Metropolis Local Management Act (18 and 19 Vict. c. 120) which was passed in the year 1855 was intended to provide for the better sewerage, drainage etc., of the whole of the Metropolis and section 141 thereof made a general provision as to naming streets and numbering houses. It is in exercise of this power that the Board effaced the numbers which had been inscribed by the Commissioners of Sewers on certain houses and put different numbers on them. The Court found that the powers conferred by the two statutes were substantially, though not strictly, the same. It also found that in respect of certain matters the powers conferred by the Commissioners of Sewers of the City of London Act were preserved. But in respect of certain general matters the whole work in the Metropolis was expressly brought within the jurisdiction of the Metropolitan Board of Works and section 141 gave the Board a general authority over the whole of the Metropolis including the City of London. After stating the general principles of construction, the Court said that as soon as the Legislature is found dealing with the same subject-matter in two Acts, so far as the later statute derogates from and is inconsistent with the earlier one, the Legislature must be held to have intended to deal in the later statute with the same subject-matter which was within the ambit of the earlier one. Upon this view they held that the Metropolitan Board of Works had authority to name streets and number houses in the City of London and that the orders of the Board as to numbering of houses in the City of London override the order of the Commissioner in the same matter. A question was posed before the Court as to whether the Commissioners of Sewers of the City of London had authority to number the houses and buildings in the streets in the City of London under section 145 of the City of London Sewers Act even after the passing of the Metropolitan Local Management Act. The learned Judges declined to answer that question and Erle, C.J., said :

"When the Metropolitan Board of Works choose to interfere in a matter which is entrusted to by the general Act, the city commissioners are subject to the Metropolitan Board. But, whether a concurrent jurisdiction is given to the city commissioners, where the Metropolitan Board have not chosen to exercise their powers, is a question upon which it will be our duty to pronounce an opinion when the point is properly presented to us."

What has to be noted in this case is that the laws with which the Court was concerned covered more or less the same subject-matter and had the same object to serve.

1. 142 E.R. 1104 : 31 L.J.C.P. 223.

Further, this decision has kept at large the question whether powers conferred upon one authority by an earlier Act could continue to be exercised by that authority after the enactment of a provision in a subsequent law conferring wide powers on another authority which would include some of the powers conferred by the earlier statute till the new authority chose to exercise the powers conferred upon it

The second decision relied upon is *The Great Central Gas Consumers Co v Clarke*¹. That was a case in which a company incorporated under a private Act was restricted to charge 4 shillings per 1,000 c ft of gas supplied by it. By a subsequent public Act for the supply of gas to the Metropolis an increased standard of purity and illuminating power was required of the companies electing to adopt the provisions of that Act as to price, purity and illuminating power and an increased charge was allowed to be made by them. The question was whether the company was restricted to charge only 4 shillings per 1,000 c ft of gas supplied by it. It was urged on behalf of the company that the later Act repealed the earlier one and that therefore, the company was not restricted to the charge of 4 shillings. After quoting the provision in the private Act containing the restriction the Court observed:

Although that section is not in terms repealed yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act. That is sufficient to get rid of the clause in the private Act. Looking at the 19th section of the general Act we think it is impossible to read it otherwise than as repealing the 24th section of the private Act. We are bound as well by the plain words of the Act as by the general scope and object of it and also by the justice of the case.

It will thus be seen that the foundation of the decision was that the later statute was a general one whereas the previous one was a special one and, therefore, the special statute had to give way, to the later general statute.

We have not been able to trace the third case upon which the learned Judges have relied because the reference which they have given of that case in the judgment is incomplete. They have merely stated "103 LKJB" without stating the page of the report or the names of the parties. Unfortunately all the citations of the High Court suffer from the latter defect. They have, however, given the following quotation from the judgment of Scrutton, L.J., and Maugham, L.J. The quotation from the former is:

I repeal the previous Act also in another way namely by enacting a provision clearly inconsistent with the previous Act.

The quotation from the judgment of Maugham, L.J., is:

It is quite plain that the Legislature is unable, according to our constitution to bind itself as to the form of subsequent legislation and it is impossible for Parliament to say that in no subsequent Act of Parliament dealing with this same subject matter shall there be an implied repeal.

The latter observations make it clear that the doctrine of implied repeal was invoked while considering two statutes—one earlier and the other later—the subject matter of both of which was the same.

The High Court then quoted certain observations of Isaacs, J., in an Australian case *Goodwin v Philip*², which are much to the same effect as those of Maugham, L.J. Finally, they have relied upon the statement of law made in Sutherland on Statutory Construction, Volume I, page 460. The substance of what they have quoted is that the doctrine of implied repeal is well recognized, that repeal by implication is a convenient form of legislation and that by using this device the Legislature must be presumed to intend to achieve a consistent body of law.

It is undoubtedly true that the Legislature can exercise the power of repeal by implication. But it is an equally well-settled principle of law that there is a presumption against an implied repeal. Upon the assumption that the Legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course, this presumption will be rebutted if the provisions

of the new Act are so inconsistent with the old ones that the two cannot stand together. As has been observed by Crawford on Statutory Construction, page 631, para 311 :

"There must be what is often 'called such a positive repugnancy between the two, provisions' of the old and the new statutes that they cannot be reconciled and made to stand together." In other words they must be absolutely repugnant or irreconcilable. Otherwise, there can be no implied repeal... for the intent of the Legislature to repeal the old enactment is utterly lacking."

The reason for the rule that an implied repeal will take place in the event of clear inconsistency or repugnancy, is pointed out in *Grosby v. Patch*¹, and is as follows :

"As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. *Bowen v. Leese*². It is a rule, says Sedgwick, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. The reason and philosophy of the rule," says the author, "is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original Act, shall not be considered as intended to effect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter Act such a construction in order that its words shall have any meaning at all."

For implying a repeal the next thing to be considered is whether the two statutes relate to the same subject-matter and have the same purpose. Crawford has stated at page 634 :

"And, as we have already suggested, it is essential that the new statute cover the entire subject-matter of the old; otherwise there is no indication of the intent of the Legislature to abrogate the old law. Consequently, the later enactment will be construed as a continuation of the old one."

The third question to be considered is whether the new statute purports to repeal the old one in its entirety or only partially. Where replacement of an earlier statute is partial, a question like the one which the Court did not choose to answer in the *Commissioners of Sewers case*³, would arise for decision.

It must be remembered that at the basis of the doctrine of implied repeal is the presumption that the Legislature which must be deemed to know the existing law did not intend to create any confusion in the law by retaining conflicting provisions on the statute book and, therefore, when the Court applies this doctrine it does no more than give effect to the intention of the Legislature ascertained by it in the usual way i.e., by examining the scope and the object of the two enactments, the earlier and the later.

The further question which is to be considered is whether there is any repugnancy between the old and the new law. In order to ascertain whether there is repugnancy or not this Court has laid down the following principles in *Deep Chand v. The State of Uttar Pradesh*⁴.

1. Whether there is direct conflict between the two provisions ;
2. where the Legislature intended to lay down an exhaustive code in respect of the subject-matter replacing the earlier law ;
3. whether the two laws occupy the same field.

Another principle of law which has to be borne in mind is stated thus by Sutherland on Statutory Construction (Vol. I, 3rd edition, page 486) :

"*Repeal of special and local statutes by general statutes* : The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute. An implied repeal of prior statutes will be restricted to statutes of the same general nature, since the Legislature is presumed to have known of the existence of prior special or particular legislation and to have contemplated only a general treatment of the subject-matter by the general enactment. Therefore, where the later general statute does not propose an irreconcilable conflict, the prior special statute will be construed as remaining in effect as a qualification of or exception to the general law."

1. 18 Calif. 438 quoted by Crawford "Statutory Construction" page 633.

2. 5 Hill 226.

3. 142 E.R. 1104 : 31 L.J.C.P. 223.

4. (1959) 2 S.G.R. 8 at p. 43 : (1959) S.C.J. 1069.

Of course, there is no rule of law to prevent repeal of a special by a later general statute and, therefore, where the provisions of the special statute are wholly repugnant to the general statute, it would be possible to infer that the special statute was repealed by the general enactment. A general statute applies to all persons and localities within its jurisdiction and scope as distinguished from a special one which in its operation is confined to a particular locality and, therefore, where it is doubtful whether the special statute was intended to be repealed by the general statute the Court should try to give effect to both the enactments as far as possible. For, as has been pointed out at page 470 of *Sutherland on Statutory Construction*, Vol. I where the repealing effect of a statute is doubtful,

the statute is to be strictly construed to effectuate its consistent operation with previous legislation

In the case before us the contention is not that the whole of the District Municipalities Act has been abrogated by the Motor Vehicles Act but that section 72 of the latter Act is the complete law on the subject of determining parking places for motor vehicles and that in so far as sections 286 and 287 of the Travancore District Municipalities Act are in conflict with that law, they must give way to it or in other words they must be deemed to have been repealed by implication. The general principles which apply to a consideration of the question whether the later enactment repeals an earlier one by implication will also have to be applied to the kind of case which is before us.

We have already quoted section 72 of the Travancore Cochin Motor Vehicles Act. It empowers the Government or an authority authorised by it to determine in consultation with a local authority places at which motor vehicles may stand or halt. Section 286 of the Travancore District Municipalities Act empowers the Municipal Council to construct or provide public halting places and cart stands and levy fees for their use. On the face of it, we do not see any inconsistency between the two provisions because it is open to the Municipal Council to exercise its powers under section 286 and charge fees from bus owners making use of the conveniences provided by it. Simultaneously with the exercise of the power under that section by the Municipal Council the Government or other appropriate authority may exercise the power under section 72 and there will be no conflict in the exercise by them of their respective powers. Since the powers under this provision are to be exercised in consultation with a local authority, in practice actual conflict may be obviated by the Government not exercising its powers under section 72 of the Travancore-Cochin Motor Vehicles Act where the Municipality has taken action under sections 286 and 287 of the Travancore District Municipalities Act. Even assuming that it does, it will have to do so in consultation with the Municipality and it may be legitimate to expect that the ultimate action would be such as not to bring about any conflict.

It has also to be borne in mind that section 72 of the Travancore Cochin Motor Vehicles Act was enacted for the purpose of enabling the Government and the appropriate authority to make provisions for parking places not only in municipal areas but in non municipal areas as well as also in municipal areas where the municipality has taken no action under section 286. Would it then be proper to say that there is a conflict between section 286 of the Travancore District Municipalities Act and section 72 of the Travancore Cochin Motor Vehicles Act? The latter provision has a wider territorial application than the former and can in that sense be said to be a general one, while the former being applicable only to municipal areas is a special one. Being a special provision section 286 cannot readily be considered as having been repealed by the more general provision of section 72 of the Travancore Cochin Motor Vehicles Act. But we must bear in mind that section 286 does not stand by itself and in order to effectuate the purpose underlying it the Legislature has enacted section 287, apparently intending that when action is taken by a municipality under section 286 it may also take consequential action under section 287.

Could it, therefore, be said that there is conflict between sections 286 and 287 on the one hand and section 72 of the Travancore-Cochin Motor Vehicles Act on the other because while under section 287 a municipality can prohibit the use as a halting place of any place within a specified distance of the bus stand constructed by it, the Government or other appropriate authority can by order permit places within the prohibited area to be used as halting places? It is urged before us on behalf of the Municipal Council that until action is taken under section 72 of the Travancore-Cochin Motor Vehicles Act which will have such result, it cannot be said that a conflict will arise and that until such conflict actually takes place the old provision must stand. In support of this contention learned Counsel refers us to the decision of Sulaiman, J., in *Shyamkant Lal v. Rambhajan Singh*¹. There, the learned Judge in his judgment has stated the principles of construction to be applied when the question arises as to whether Provincial legislation is repugnant to an existing Indian law. In the course of his judgment the learned Judge has observed :

“Further, repugnancy must exist in fact, and not depend merely on a possibility.”

He relied upon the decision in *Attorney-General for Ontario v. Attorney-General for the Dominion*² in support of his view. In that case there was a prior Provincial law enabling local authorities to adopt certain provisions of a Provincial law for enforcing prohibition. Then a later Dominion law was enacted called the Canada Temperance Act, 1886, which provided that Part II of that law could be brought into operation in a Province by an order of the Governor-General of Canada in Council. It may be mentioned that there were certain provisions in the Dominion Act which purported to repeal the prohibitory provision of the Provincial Act. The Privy Council held that those provisions were *ultra vires*. It was contended before the Privy Council alternatively that the provision of the Provincial Act being repugnant to the Dominion Act stood repealed by implication by the provisions of Part II of the Dominion Act, by resorting to which local authorities could introduce prohibition in their areas. The Privy Council pointed out that the provisions were inapplicable until an order was made by the Governor-General of Canada in Council applying Part II of the Act to a Province and in fact no such order was made. That case is clearly distinguishable because Part II of the Act had not come into force at all and since it was not in force in a Province the question of its being in conflict with the Provincial law did not arise.

It seems to us, however, clear that bearing in mind the fact that the provisions of section 72 of the Travancore-Cochin Motor Vehicles Act were intended to apply to a much wider area than those of sections 286 and 287 of the Travancore District Municipalities Act it cannot be said that section 72 was intended to replace those provisions of the Travancore District Municipalities Act. The proper way of construing the two sets of provisions would be to regard section 72 of the Travancore-Cochin Motor Vehicles Act as a provision in continuity with sections 286 and 287 of the Travancore District Municipalities Act so that it could be availed of by the appropriate authority as and when it chose. In other words the intention of the Legislature appears to be to allow the two sets of provisions to co-exist because both are enabling ones. Where such is the position, we cannot imply repeal. The result of this undoubtedly would be that a provision which is added subsequently that is, which represents the latest will of the Legislature will have no overriding effect on the earlier provision in the sense that despite the fact that some action has been taken by the Municipal Council by resorting to the earlier provision the appropriate authority may nevertheless take action under section 72 of the Travancore-Cochin Motor Vehicles Act, the result of which would be to override the action taken by the Municipal Council under section 287 of the District Municipalities Act. No action under section 72 has so far been taken by the Government and, therefore, the resolutions of the Municipal Council still hold good. Upon this view it is not necessary to consider certain other points raised by learned Counsel.

1. (1939) F.C.R. 193 at 212 : (1939) F.L.J. 183 : (1939) 2 M.L.J. (Supp.) 45.

2. L.R. (1896) A.C. 348 at pp. 369-370.

For these reasons we allow the appeals and set aside the orders of the High Court and quash the writs issued by it. There will, however, be no order as to costs as the respondents have not appeared.

K. L. B.

Appeals allowed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —B. P. SINHA, Chief Justice, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Braham Parkash and another

.. Appellants*

v.

Manbir Singh and others

.. Respondents.

Mortgage—Subrogation—Creditor redeeming mortgage—Written agreement stipulating for right of subrogation—If necessary—Intention to keep alive the mortgage discharged by creditor—No refutation of plea in pleadings—Not allowed to be raised in Supreme Court on appeal—Transfer of Property Act (IV of 1982), section 92—Mortgage—Marshalling—Subsequent purchaser having mortgage rights over property of mortgagor other than that in respect of which marshalling claimed—Purchaser entitled to rights—Question of prejudice in marshalling—Matter for pleading and proof—Transfer of Property Act (IV of 1982), section 56.

The contention that "even where there was no express agreement stipulating for subrogation, the law would presume such a right on the ground that the payer intended to act in a manner most advantageous to him, but that this was only a rebuttable presumption which would be negated on positive proof from the conduct or statements of such a creditor pointing to a contrary intention, or in other words, that there was nothing to prevent its being shown that the creditor paying off the charge did not intend to preserve the mortgage which he discharged so as to obtain the priority which the discharged encumbrance enjoyed" was not allowed to be raised in the Supreme Court. The specific plea of the other side that there was such an intention to keep alive the discharged mortgage was not refuted in any stage of the litigation.

When section 56 of the Transfer of Property Act dealing with rights to marshalling, refers to a subsequent purchaser it does not obviously exclude a purchaser who has some mortgage over property with which these proceedings are not concerned. His mortgage rights over some other property of the mortgagor is wholly irrelevant for considering his rights *qua* purchaser of one of the properties to which the opening words of section 56 apply.

The question of prejudice in marshalling is purely one of fact which has to be pleaded and the necessary facts and circumstances established. It is obvious that the question of prejudice would be intimately connected with the value of the property against which the mortgagee is directed to proceed in the first instance. If even after paying off such a mortgage there is enough left for payment over to the subsequent encumbrancer referred to in the last portion of section 56 it would be manifest that there would be no question of prejudice. If therefore the appellant desired to invoke the benefit of the last portion of section 56 he should have made some plea as to the value of the property and shown how it would prejudice his rights as a subsequent encumbrancer.

No such plea and no evidence was led as to the value of the property.

As the point is one not of pure law but springs from the factual inadequacy of the property mortgaged to him to discharge his debt it is too late for the appellant to raise such a plea in the Supreme Court.

Appeals from the Judgment and Decree dated 19th May, 1955, of the Punjab High Court in Regular First Appeals Nos. 28, 12 and 13 of 1948 respectively.

Gopal Singh, Advocate for R. S. Narula, Advocate, for Appellant (In C.A. No. 76 of 1961) and Appellant No. 2 (In C. As. Nos. 77 and 78 of 1961).

Achhru Ram, Senior Advocate, (Naunil Lal, Advocate, with him), for Appellant No. 1 (In C. As. Nos. 77 and 78 of 1961).

Bishan Narain, Senior Advocate, (B. P. Maheshwari, Advocate, with him), for Respondents Nos. 9 and 18 to 20 (In C.A. No. 77 of 1961).

The Judgment of the Court was delivered by:

Rajagopala Ayyangar, J.—These three appeals, which are before us on certificates of fitness granted by the High Court of Punjab, arise out of two suits for the

recovery of amounts due on mortgages executed by one Mohinder Singh who was a contractor in Delhi. Mohinder Singh is now deceased and is now represented in these proceedings by his widow and son. Mohinder Singh owned as many as eight properties in Delhi and over one or other of these he created successively 24 mortgages between September, 1943 and July, 1944 and also executed a sale in respect of one item of these properties. The contentions urged in these appeals arise out of conflicts between the rights of some of these mortgagees *inter se*, or between some of them and the purchaser of one of the properties. It is however unnecessary for the purpose of deciding these points to set out the details of every one of these several mortgages or their history.

Appeals 77 and 78 may first be considered. The facts necessary to appreciate the sole point raised by Mr. Achhru Ram, learned Counsel for the appellant—Jagdish Chand are these : The property concerned in the two appeals is plot No. 1 Pusa Road in Block 34 with a bungalow thereon. A mortgage for Rs. 70,000 was created over this and certain other properties (We are, however, not concerned with these other properties) in favour of one Lajwanti by Mohinder Singh by a deed dated 19th October, 1943. A few days later—on 7th November, 1943—another mortgage was executed in her favour for Rs. 16,000 under which the property No. 1, Pusa Road, was given as security. Passing over certain intermediate transactions not material for the purposes of the present appeals, a mortgage was created in favour of one Daulatram Narula *inter alia* on this property on 21st January, 1944, to secure a sum of Rs. 60,000. Two days later—on 23rd January, 1944—the appellant, Jagdish Chand, lent a sum of Rs. 10,000 to Mohinder Singh and had a mortgage executed on No. 1, Pusa Road. Daulatram Narula, the mortgagee under the deed dated 21st January, 1944, obtained two further mortgages over the same property and others on 25th February, 1944, and 14th March, 1944, the first for Rs. 9,500 and the second for Rs. 10,000. It ought to be mentioned that the consideration for several of the mortgages referred to earlier was in part a payment in cash to the mortgagor and in part the repayment in part satisfaction of previous mortgages, but this circumstance not being of any relevance we are not setting out the details of the consideration for the several mortgages. Lastly, and this is the mortgage which is of importance for the point raised in this appeal, on 18th July, 1944, Mohinder Singh created in favour of Pandit Sham Sunder an usufructuary mortgage for Rs. 1,25,000 out of which Rs. 84,000 was reserved with the mortgagee for payment to Daulatram Narula the sum representing the principal and interest due on his three mortgages. It is common ground that on the date when the mortgage was registered Sham Sunder carried out his obligation and discharged the mortgages of Daulatram by paying him Rs. 84,000.

The amount due to Lajwanti was not paid, and she accordingly brought a suit on 14th June, 1945, in the Court of the Senior Sub-Judge, Delhi, for the recovery of her mortgage money which, after giving credit for the sums paid to her already by several subsequent mortgagees, came to Rs. 11,657-5-4. She impleaded as party defendants to the suit the several subsequent mortgagees including the appellant—Jagdish Chand as well as Daulatram and Sham Sunder's legal representatives as he himself was dead by that date. Just like Lajwanti another mortgagee—one Mukhlam in whose favour two mortgages, one dated 1st February, 1944, and another dated 12th May, 1944, for Rs. 10,000 and Rs. 9,000 respectively, also filed a suit for the recovery of Rs. 15,302 and odd. As in Lajwanti's suit, the several subsequent mortgagees including Jagdish Chand, Daulatram and the legal representatives of Pt. Sham Sunder were also impleaded as defendants in this suit also.

In these two suits the genuineness of the several mortgages was not seriously disputed and the only point on which contest was centered was as regards the respective rights of the several mortgagees *inter se*. We are concerned in these two appeals with the claim made by the legal representatives of Sham Sunder that they were entitled by reason of their discharging the mortgage-debt of Daulatram to whom they had paid Rs. 84,000 out of the mortgage amount of Rs. 1,25,000

to be subrogated to the rights and priorities of Daulatram under the mortgage dated 21st January, 1944, for Rs 60 000 as against the later mortgage of the 23rd January, of Jagdish Chand even though there was no agreement in writing under which he stipulated for such a right. This contention was raised both in the suit by Lajwanti as well as in Mukhamal's suit. It was contended on their behalf that though the Transfer of Property Act did not in terms apply, yet the equitable principle underlying its section 92 viz., the right of a secured creditor who had discharged a prior encumbrancer to be subrogated to the rights and priorities of the mortgagee whom he had redeemed, could nevertheless be invoked under section 6 of the Punjab Laws Act. The learned trial Judge, however, while acceding to this in principle, held on the basis of certain authorities to which he referred that in the absence of a specific agreement stipulating for subrogation the subsequent mortgagee was not entitled to such an equity. On this ground the right of subrogation claimed by the legal representatives of Sham Sunder was rejected. From the rejection of this claim in the two suits Sham Sunder's representatives preferred two appeals to the High Court and the learned Judges allowed the appeal holding that it was not an essential condition for claiming the right of subrogation that the creditor redeeming the mortgage should have entered into an express agreement to that effect. It is from this decision of the High Court that these two appeals have been preferred.

Mr Achhru Ram, learned Counsel for the appellant did not dispute before us the correctness of the view expressed by the learned Judges of the High Court that in order to entitle a creditor to claim a right of subrogation it was not necessary that he should have entered into a written agreement stipulating for such a right. His submission, however, was on the following lines. Accepting the law as expounded by Sir Richard Couch in *Gokuldas v Ram Bux*¹, in the following terms

In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed.

The obvious question to ask in the interest of justice, equity and good conscience is what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it what intent on should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance he is assumed, in the absence of evidence to the contrary to have intended to keep the charge alive. It cannot be said whether the division of interests in the property is by way of life estate and remainder or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot charge upon the corpus which he has paid.

as laying down the correct test for determining whether the right of subrogation could be claimed or not, Mr Achhru Ram submitted that the law was that even where there was no express agreement stipulating for subrogation, the law would presume such a right on the ground that the payer intended to act in a manner most advantageous to him, but that this was only a rebuttable presumption which would be negated on positive proof from the conduct or statements of such a creditor pointing to a contrary intention. In other words, that there was nothing to prevent its being shown that the creditor paying off the charge did not intend to preserve the mortgage which he discharged so as to obtain the priority which the discharged encumbrance enjoyed. He urged that in the present case, on the terms of the documents to which Sham Sunder was a party, such an intention not to keep alive the discharged encumbrance of Daulatram was clearly made out. It is in this connection he drew our attention first to the terms of the mortgage executed in favour of Sham Sunder on 13th July, 1944, in which this Rs 84, 000 left with the mortgagee is referred to as being held by the latter in trust for the payment of the previous encumbrancer—Daulatram. Next, he referred us to the endorsements of discharge on the mortgages of Daulatram which read as if the amount due had been paid by Sham Sunder on behalf of the mortgagor—Mohinder. On this basis the contention was urged that any intention to obtain the benefit of subrogation was clearly negated.

We do not propose to discuss the merits of this contention, and it is not as if it is not capable of cogent refutation, because we are satisfied that the appellant should not be permitted to raise such an argument at this stage. In both the suits the legal representatives of Sham Sunder filed written statements in which they specifically stated that the discharge of the encumbrances of Daultatram was under circumstances in which they were entitled to claim the relief of subrogation. The question regarding the intention with which a prior encumbrance is discharged, whether it is with a view to obtain the priority of the mortgage paid off or not, in circumstances like the present would be a question of fact and would have to be answered on a conspectus of the entire circumstances of the case. If the appellant was disputing the plea of Sham Sunder's representatives that the intention of Sham Sunder in discharging Daultatram's mortgages was to retain the benefit of subrogation, it was for him to have raised it by proper pleading when an issue would have been struck and evidence led for or against such a contention. At the stage of the trial the only objection raised to the claim for subrogation was based on the absence of a written agreement which the appellant contended was a requirement of the law which had not been complied with. In one sense such a plea would appear to assume that the intention of the party paying off the mortgage was to obtain the benefit of subrogation but that he had failed to comply with a requirement of the law in having that intention embodied in a document. This plea was accepted by the learned trial Judge and the claim for subrogation was disallowed but Sham Sunder's representatives filed an appeal to the High Court. Again, at the stage of the appeal the only contention urged before the learned Judges was as regards this supposed requirement of the law that there should be a written agreement. When this plea was rejected it is obvious that on the pleadings the right to subrogation should be held to be established. The matter, however, does not stop here, because even at the stage of appeal to this Court no point was made that in the instant case the presumption in favour of a person having acted to his interest and so entitled to claim subrogation was displaced by clear evidence of the party's statements or conduct. Nor can even a trace of such plea be found in the statement of case filed in these appeals. We do not therefore consider it proper to permit learned Counsel to urge any such ground before us.

This was the only point urged in these appeals which fail and are dismissed with costs—one set payable to the executors of the will of Pt. Sham Sunder.

Civil Appeal 76 of 1961.—This appeal arises out of the suit by Lajwanti already referred to. The appellant is one Braham Parkash in whose favour Mohinder Singh executed a mortgage for Rs. 15,000 on 2nd May, 1944. The property mortgaged was plot No. 44 in block 17-A with the superstructure on it and plot No. 19 in Block No. 5. Braham Parkash was the twentieth defendant in Lajwanti's suit. Plot No. 14 of Block No. 13 was sold by Mohinder to one Mukhamal Gokul Chand by deed dated 28th April, 1944. It is the claim of this Mukhamal to marshalling that is the main subject of controversy in this appeal. As we have stated earlier, Lajwanti's mortgage dated 19th October, 1943, for Rs. 10,000 comprised of several properties including plot No. 14 which on 28th April, 1944 had been sold to Mukhamal. Now Mukhamal who had been impleaded as a subsequent transferee in Lajwanti's suit claimed that he was entitled to marshalling on the principle to be found in section 56 of the Transfer of Property Act which runs as follows :

"56. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer, is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

This claim was however disallowed by the trial Judge for reasons to which it is not necessary to advert. Mukhamal Gokul Chand filed an appeal to the High Court

in which he made the same prayer. The learned Judges of the High Court upheld Mukhamal's contention that he was entitled to marshalling and directed that Lajwanti should proceed first against plot No. 44 and only for the deficiency, if any, against plot No. 14 which Mukhamal had purchased. It is the correctness of this decision that is challenged by Braham Prakash in this appeal. Mukhamal Gokul Chand has not entered appearance and the appeal has been heard *ex parte*.

Before dealing with the correctness of this direction as regards marshalling it is necessary to mention one further fact—Mukhamal's appeal to the High Court—Appeal 28 of 1948 was filed out of time with a petition for condonation of delay under section 5 of the Indian Limitation Act and the learned Judges condoned the delay and entertained the appeal. The legality and propriety of this order condoning the delay is canvassed before us by learned Counsel for the appellant. The facts relevant for the consideration of this point are briefly as follows. The preliminary decree of the trial Judge from which the Appeal No. 28 of 1948 was filed was dated 28th April, 1947. An application for the grant of certified copies was made on 16th October, 1947, and the copies were ready for delivery on 28th October, 1947. The appeal, however, was actually filed only on 10th March, 1948, admittedly after the period of limitation had expired. The application to the High Court for condoning this delay was supported by an affidavit by one Amar Nath. Before setting out the contents of this affidavit it must be mentioned that the disturbed state of the Punjab at the time of the partition was taken into account by the Legislature and by East Punjab Act XVI of 1947 the period from 19th September, 1947 to 15th November, 1947 was directed to be excluded in computing limitation for any purpose of the Limitation Act including section 5. In the affidavit in support of the application for the condonation of the delay it was stated that the firm of Gokul Chand had handed over the papers to their Munim on or about 1st November, 1947 for filing an appeal but the Munim who was a Muslim went away to Pakistan without handing over the certified copies of the judgment to the parties and that the copies were received from Pakistan on 4th March, 1948, a few days before the affidavit was sworn and that immediately after the receipt of the papers the appeal was filed at Simla on 10th March, 1948. The learned Judges in dealing with this application observed

"In 1947-48 unprecedented events occurred in Delhi with the result that in some cases the whereabouts of close relatives were not known for months. In the present case not a syllable is to be found on the record to show that the affidavit of Amar Nath was untrue in any particular. That being so I have no doubt that there was sufficient cause for not filing the appeal in time. In these circumstances I condone the delay in filing the appeal.—Regular 1st Appeal No. 28 of 1948

Learned Counsel for the appellant submitted that the learned Judges had not required the petitioner for condonation to explain each day's delay, thus departing from the accepted tests for condonation under section 5 of the Limitation Act. We are not, however, persuaded that the learned Judges were either unmindful of the principles on which delay should be excused or went wrong in the exercise of the discretion which they undoubtedly possessed and that, in any event, we do not consider that this is a fit case in which we should interfere in appeal.

Coming now to the merits of the appeal, learned Counsel strenuously urged that the learned Judges of the High Court had misapplied the principles underlying section 56 of the Transfer of Property Act in directing Lajwanti to proceed first against the property not sold to Gokul Chand. In this connection learned Counsel urged two points: (1) that on a proper construction of section 56 and the principle underlying it the benefit of marshalling could not be claimed by a purchaser who happened to be a mortgagee in respect of any property belonging to the mortgagor. Learned Counsel pointed out that Mukhamal Gokul Chand had a mortgage under a deed dated 9th February, 1944, over certain properties with which the appellant is not concerned. We consider this submission wholly without substance. When section 56 refers to a subsequent purchaser it does not obviously exclude a purchaser

who has some mortgage over property with which these proceedings are not concerned. His mortgage rights over some other property of the mortgagor is wholly irrelevant for considering his rights *qua* purchaser of one of the properties to which the opening words of section 56 apply. The construction contended for, in our opinion, has only to be stated to be rejected.

(2) the other submission of learned Counsel was that the learned Judges failed to give effect to the last portion of section 56 under which marshalling is not to be permitted so as to prejudice the rights *inter alia* of the mortgagees or other persons claiming under him, *i.e.*, under the original mortgagor. Learned Counsel pointed out that the appellant having proved his mortgage and the fact that it was subsisting, the learned Judges of the High Court ought to have held that any direction as to marshalling must necessarily prejudice him. We are unable to agree that this follows as any matter of law. The question of prejudice is purely one of fact which has to be pleaded and the necessary facts and circumstances established. It is obvious that the question of prejudice would be intimately connected with the value of the property against which the mortgagee is directed to proceed in the first instance. If even after paying off such a mortgage there is enough left for payment over to the subsequent encumbrancer referred to in the last portion of section 56 it would be manifest that there would be no question of prejudice. If therefore the appellant desired to invoke the benefit of the last portion of section 56 he should have made some plea as to the value of the property and shown how it would prejudice his rights as a subsequent encumbrancer. He however made no such plea and no evidence was led as to the value of the property. Even at the stage of the appeal in the High Court the contention that to allow marshalling in favour of the subsequent purchaser—Mukhamal—would result in prejudice to him was admittedly never put forward before the learned Judges. As the point is one not of pure law but springs from the factual inadequacy of the property mortgaged to him to discharge his debt it is too late for the appellant to raise such a plea in this Court.

The appeal fails and is dismissed.

V.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Bhagwan Swarup Lal Bishan Lal and others

*Appellants**

v.

The State of Maharashtra

Respondent.

Constitution of India 1950, Article 145 (3)—Substantial question of law as to interpretation of Constitution—Hearing by Bench of five Judges—Not necessary if the question had already been finally decided by Supreme Court—Article 20 (2)—Same offence—Meaning of—Identity of ingredients of offence—Criminal conspiracy—Question of same offence—Motive.

Evidence Act (I of 1872), sections 53 and 55—Character evidence—General reputation and general disposition—Distinction between—Evidentiary value of—Cannot outweigh positive evidence of guilt—Section 10—Conspiracy—Act said or done by one conspirator—Admissibility against co-conspirators—Essential factors.

Under Article 145 (3) of the Constitution only a case involving a substantial question of law as to the interpretation of the Constitution shall be heard by a Bench comprising not less than five Judges. A substantial question of interpretation of a provision of the Constitution cannot arise when the law on the subject has been finally and effectively decided by this Court. [*State of Jammu and Kashmir v. Thakur Ganga Singh*, (1960) S.C.J. 231 : (1960) M.L.J. (Cri.) 180: (1960) 1 M.L.J. (S.C.) 67].

Two decisions of this Court have construed the provisions of Article 20 (2) of the Constitution in the context of the expression "same offence". They lay down that the test to ascertain whether two offences are the same is not the identity of the allegations but the identity of the ingredients of the offences.

As the question raised has already been decided by this Court, what remains is only the application of the principle laid down to the facts of the present case. It cannot, therefore, be held that the

* Cri. Appeals Nos. 67, 136 and 172 of 1959 and 82 and 83 of 1962.

question raised involves a substantial question of law as to the interpretation of the Constitution within the meaning of Article 145 (3) of the Constitution

The Jupiter conspiracy came to an end when its funds were misappropriated. The Empire conspiracy was hatched subsequently though its object had an intimate connection with the Jupiter in that the fraud of the Empire was conceived and executed to cover up the fraud of the Jupiter. The two conspiracies are distinct offences. It cannot even be said that some of the ingredients of both the conspiracies are the same. The facts constituting the Jupiter conspiracy are not the ingredients of the offence of the Empire conspiracy but only afford a motive for the latter offence. Motive is not an ingredient of an offence. The proof of motive helps a Court in coming to a correct conclusion when there is no direct evidence. Where there is direct evidence for implicating an accused in an offence the absence of proof of motive is not material. The ingredients of both the offences are totally different and they do not form the same offence within the meaning of Article 20 (2) of the Constitution and, therefore that Article has no relevance to the present case.

It is clear from the provisions of sections 53 and 55 of the Evidence Act that the evidence of general reputation and general disposition is relevant in a criminal proceeding. Under the Indian Evidence Act unlike in England evidence can be given both of general character and general disposition. Disposition means the inherent qualities of a person reputation means the general credit of the person amongst the public. There is a real distinction between reputation and disposition. A man may be reputed to be a good man but in reality he may have a bad disposition. The value of evidence as regards disposition of a person depends not only upon the witnesses' perspicacity but also on their opportunities to observe a person as well as the person's cleverness to hide his real traits. But a disposition of a man may be made up of many traits, some good and some bad and only evidence in regard to a particular trait with which the witness is familiar would be of some use.

But in any case the character evidence is a very weak evidence, it cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful in doubtful cases to tilt the balance in favour of the accused or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence. The opinion expressed by the witnesses may do credit to the accused but in the face of the positive evidence relating to his guilt it cannot turn the scale in his favour.

Section 10 of the Evidence Act can be analysed as follows.—There shall be a *prima facie* evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy. If the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other. Anything said done or written by him should have been said, done or written by him after the intention was formed by any one of them. It would also be relevant for the said purpose against another who entered the conspiracy whether it was said done or written before he entered the conspiracy or after he left it. It can only be used against a co-conspirator and not in his favour.

Appeals by Special Leave from the Judgment and Order dated 3rd November, 1958 in Criminal Appeals Nos 196, 256 and 363 of 1958 of the High Court of Bombay

B B Tawakley, Senior Advocate (*S C Mazumdar*, Advocate, with him), for Appellant (In CrI A. No 67 of 1959)

S C Mazumdar, Advocate, for Appellant (In CrI A. No 136 of 1959)

T S Venkataraman, Advocate (*amicus curiae*), for Appellant (In CrI A. No 172 of 1959)

N N Keshwani, Advocate, for Appellant (In CrI A. No 82 of 1962)

C B Agarwala, Senior Advocate, *K L Misra*, Advocate-General, UP (*Mangala Prasad Baghari*, *Shanti Sarup Khanduja*, *Malik Arjun Das* and *Ganpat Rai*, Advocates, with them), for Appellant (In CrI A. No 83 of 1962)

N S Bindra and *D R Prem*, Senior Advocates (*R H Dhebar*, Advocate, with them), for Respondent (In all the Appeals)

The Judgment of the Court was delivered by

Subba Rao, J—These appeals by Special Leave arise out of two judgments of the High Court of Bombay, one that of Vyas and Kotval, JJ, dated 31st March, 1958 and the other that of Shah and Shelat, JJ, dated 3rd November, 1958, in what, for convenience of reference, may be described as the Empire Conspiracy Case.

At the outset it would be convenient to state briefly the case of the prosecution. One Lala Shankarlal, a political leader and Vice-President of the Forward Bloc and a highly competent commercial magnate, and his nominees held the controlling block of shares of the Tropical Insurance Company, Limited, hereinafter called

the "Tropical", and he was the Chairman and Managing Director of the said company. He had also controlling voice in another company called the Delhi Swadeshi Co-operative Stores, Ltd. The said Delhi Stores held a large number of shares of the Tropical. In or about the middle of 1948, Sardar Sardul Singh Caveeshar, who was controlling the People's Insurance Co., Ltd., and other concerns in Lahore, and Kaul, a practising Barrister, came to Delhi. During that year, the former was the President of the Forward Bloc and Shankarlal was its Vice-President. Shankarlal, Caveeshar and Kaul conceived the idea of purchasing the controlling block of 63,000 shares of the Jupiter Insurance Company, Ltd., hereinafter referred to as the "Jupiter", a prosperous company, in the name of the Tropical from the Khaitan Group which was holding the said Jupiter shares. But the financial position of the Tropical did not permit the said purchase and so they thought of a fraudulent device of purchasing the said Jupiter shares out of the funds of the Jupiter itself. Under an agreement entered into with the Khaitan Group, the price of the 63,000 shares of the Jupiter was fixed at Rs. 33,39,000, and the purchasers agreed to pay Rs. 5,00,000 in advance as "black money" and the balance of Rs. 28,39,000, representing the actual price on paper, within 20th January, 1949, i.e., after the purchasers got control of the Jupiter. After the purchase, Shankarlal Group took charge of the Jupiter as its Directors after following the necessary formalities, sold the securities of the Jupiter for the required amount, and paid the balance of the purchase money to the Khaitan Group within the prescribed time. In order to cover up this fraud various manipulations were made in the relevant account books of the Jupiter. There would be an audit before the end of the year and there was every likelihood of detection of their fraud. It, therefore, became necessary for them to evolve a scheme which would bring in money to cover the said fraud perpetuated by the Directors of the Jupiter in the acquisition of its 63,000 controlling shares. For that purpose, Shankarlal and his group conceived the idea of purchasing the controlling interest in another insurance company so that the funds of that company might be utilized to cover up the Jupiter fraud. With that object, in or about September, 1949, Shankarlal and 9 of his friends entered into a conspiracy to lift the funds of the Empire of India Life Assurance Company, Ltd., hereinafter referred to as the "Empire", to cover up the Jupiter fraud. This they intended to do by purchasing the controlling shares of the Empire, by some of them becoming its Directors and Secretary, and by utilizing the funds of the Empire to cover up the defalcations made in the Jupiter. The following were the members of the conspiracy: (1) Shankarlal, (2) Kaul, (3) Mehta, (4) Jhaveri and (5) Doshi—all Directors of the Jupiter—and (6) Guha, the Secretary of the Jupiter, (7) Ramsharan, the Secretary of the Tropical, (8) Caveeshar, the Managing Director of the People's Insurance Co., (9) Damodar Swarup, a political worker who was later on appointed as the Managing Director of the Empire, (10) Subhedar, another political worker, (11) Sayana, a businessman of Bombay, and (12) Bhagwan Swarup, the nephew of Shankarlal and a retired Assistant Commissioner of Income-tax of the Patiala State. After forming the conspiracy, the controlling shares of the Empire were purchased in the name of Damodar Swarup for an approximate sum of Rs. 43,00,000. For that purpose securities of the Jupiter of the value of Rs. 48,75,000 were withdrawn by the Directors of the Jupiter without a resolution of the Board of Directors to that effect and endorsed in the name of Damodar Swarup again without any resolution of the Board of Directors to that effect. Damodar Swarup deposited the said securities in the Punjab National Bank, Ltd., and opened a cash-credit account in the said Bank in his own name. He also executed two promissory notes in favour of the said Bank for a sum of Rs. 10,00,000 and Rs. 43,00,000 respectively. Having opened the said account, Damodar Swarup drew from the said account by means of 8 cheques a sum of Rs. 43,00,000 and paid the same towards the purchase of the said Empire shares. Out of the said shares of the Empire, qualifying shares of twenty were transferred in each of the names of Damodar Swarup, Subhedar and Sayana, and by necessary resolutions Damodar Swarup became the Managing Director and Chairman of the Empire and the

other two, its Directors, and Bhagwan Swarup was appointed its Secretary. The conspirators having thus taken control of the Empire through some of them, lifted large amounts of the Empire to the tune of Rs. 62,42,700 by bogus sale and loan, and with the said amount they not only recouped the amounts paid out of the Jupiter for the purchase of its controlling shares and also the large amounts paid for the purchase of the controlling shares of the Empire. After the conspiracy was discovered, in due course the following ten of the said conspirators, i.e., all the conspirators excluding Shankarlal and another, who died pending the investigation, were brought to trial before the Court of the Sessions Judge for Greater Bombay under section 120 B of the Indian Penal Code and also each one of them separately under section 409, read with section 109, of the said Code. (1) Kaul, (2) Mehta, (3) Jhaveri, (4) Guha, (5) Ramsharan, (6) Caveeshar, (7) Damodar Swarup, (8) Subhedar, (9) Sayana, and (10) Bhagwan Swarup. The gravamen of the charge against them was that they, along with Shankarlal and Doshi, both of them deceased, entered into a criminal conspiracy at Bombay and elsewhere between or about the period from 20th September, 1950 to 31st December, 1950 to commit or cause to be committed criminal breach of trust in respect of Government securities or proceeds thereof or the funds of the Empire of India Life Assurance Co., Ltd., Bombay, by acquiring its management and control and dominion over the said property in the way of business as Directors, Agents or Attorneys of the said Company. The details of the other charges need not be given as the accused were acquitted in respect thereof.

Learned Sessions Judge made an elaborate enquiry, considered the innumerable documents filed and the oral evidence adduced in the case and came to the conclusion that Accused 1, 2, 4, 5, 6 and 10 were guilty of the offence under section 120-B, read with section 409, of the Indian Penal Code and sentenced them to various terms of imprisonment. Accused 6, i.e., Caveeshar, was sentenced to suffer rigorous imprisonment for 5 years, and Accused 10, i.e., Bhagwan Swarup, to rigorous imprisonment for a period of 5 years and also to pay a fine of Rs. 2,500 and in default to suffer a rigorous imprisonment for a further period of six months. He acquitted Accused 3, 7, 8 and 9.

The State preferred an appeal to the High Court against that part of the judgment of the learned Sessions Judge acquitting some of the accused and the convicted accused filed appeals against their convictions. The appeal filed by Caveeshar, Accused 6, was dismissed *in limine* by the High Court. The appeals filed by the other convicted accused against their convictions were dismissed and the appeal by the State against the acquittal of some of the accused was allowed by the High Court. Accused 7 was sentenced to 5 years rigorous imprisonment, Accused 8 to 3 years' rigorous imprisonment, and Accused 9 to 3 years' rigorous imprisonment.

Accused 6, 7, 8, 9 and 10 have by Special Leave preferred these appeals against their convictions and sentences. We are not concerned with the other accused as some of them died and others did not choose to file appeals.

At the outset it may be stated that none of the learned Counsel appearing for the accused questioned the factum of conspiracy, nor did they canvass the correctness of the findings of the Courts below that the funds of the Empire were utilised to cover up the fraud committed in the Jupiter, but on behalf of each of the appellants a serious attempt was made to exculpate him from the offence. But, as the defalcations made in the finances of the Jupiter and the mode adopted to lift the funds of the Empire and transfer them to the coffers of the Jupiter will have some impact on the question of the culpability of the appellants, we shall briefly notice the *modus operandi* of the scheme of conspiracy and the financial adjustments made pursuant thereto.

We have already referred to the fact that Shankarlal Group purchased the controlling shares of the Jupiter from Khaitan Group and that as a consideration for the said purchase the former agreed to pay the latter Rs. 5,00,000 as 'black money' and pay the balance of about Rs. 28,39,000 on or before 20th January, 1949. After Shankarlal Group became the Directors of the Jupiter, they paid the said amount

from and out of the funds of the Jupiter. To cover up that fraud, on 11th January, 1949, the Directors passed a resolution granting a loan of Rs. 25,15,000 to Accused 6, on the basis of an application made by him, on equitable mortgage of his properties in Delhi (see Exhibit Z-22). They passed another resolution sanctioning the purchase of plots of the Delhi Stores, a concern of Shankarlal, for a sum of Rs. 2,60,000. It is in evidence that Accused 6 had no property in Delhi and that the said plots were not owned by the Delhi Stores. The said loan and the sale price of the plots covered by the said resolutions were really intended for drawing the money of the Jupiter for paying the Khaitan Group before 20th January, 1949. But some shareholders got scept of the alleged fraud and issued notices; and the Directors were also afraid of detection of their fraud by the Auditors during their inspection at the close of the year 1949. It, therefore, became necessary to show in the accounts of the Jupiter that the loan alleged to have been advanced to Accused 6 was paid off. For this purpose the Directors brought into existence the following four transactions: (1) a loan of Rs. 5,00,000 advanced to Raghavji on 5th November, 1949; (2) a loan of Rs. 5,30,000 to Misri Devi on 12th December, 1949; (3) a fresh loan of Rs. 5,30,000 to Caveeshar, Accused 6, on 5th November, 1949; and (4) a transaction of purchase of 54,000 shares of the Tropical for Rs. 14,00,000 on 25th May, 1949 and 20th December, 1949. These four fictitious transactions were brought about to show the discharge of the loan advanced to Caveeshar, Accused 6. Further manipulations were made in the accounts showing that parts of the loans due from Raghavji, Misri Devi and Caveeshar and also the price of the Tropical shares were paid by Caveeshar. These paper entries did not satisfy the Auditors and they insisted upon further scrutiny. It is the case of the prosecution that Shankarlal and his co-conspirators following their usual pattern conceived the idea of getting the controlling interest of the Empire, which had a reserve of Rs. 9 crores. Jupiter securities worth about Rs. 45,00,000 were endorsed in favour of Accused 7, who in his turn endorsed them in favour of the Punjab National Bank, Ltd., for the purpose of opening a cash-credit account therein. On 5th October, 1950, under Exhibit Z-9, the controlling shares of the Empire were purchased from Ramsharan Group and the consideration therefor was paid from and out of the money raised on the Jupiter securities. The Directors of the Jupiter had to make good to the Company not only the amounts paid out of the Jupiter funds to purchase the controlling shares of the Jupiter, in regard to which various manipulations were made in the Jupiter accounts, but also about Rs. 45,00,000 worth of securities transferred in the name of Damodar Swarup. Having purchased the controlling shares of the Empire, Shankarlal and his colleagues got their nominees, namely, Accused 7, 8 and 9 as Directors and Accused 10 as the Secretary of the Empire. On 27th November, 1950, a resolution of the Directors of the Empire sanctioned the purchase of Rs. 20,00,000 worth of Government securities alleged to belong to the Jupiter. Though the securities were not delivered, two bearer-cheques dated 26th October, 1950 and 27th October, 1950 for Rs. 15,00,000 and Rs. 5,00,000 respectively were made out and cashed and the said moneys were utilised to cancel the loan alleged to have been advanced to Raghavji and for the purchase of the Tropical shares for Rs. 14,00,000. But the conspirators had still to make good the securities transferred in favour of Accused 7 and other amounts. The Directors again sanctioned 12 loans, the first six on 27th November, 1950 totalling Rs. 28,20,000 and the other six on 18th December, 1950 totalling Rs. 42,80,000, admittedly to fictitious loanecs. 12 bearer-cheques for an aggregate of Rs. 71,00,000 were issued by Accused 10 between December 19 and 23, 1950. This amount was utilised for getting 5 drafts for different amounts in favour of Accused 1 and 2, the Directors of the Jupiter, Accused 4, its Secretary, and Accused 5, the Secretary of the Tropical (see Exhibit Z-230). The said drafts were sent to Bombay and one of the said drafts was utilised for paying off the loan of Misri Devi and the other drafts for Rs. 57,00,000 were paid into the Jupiter account in the Punjab National Bank, Ltd., Bombay. This amount was utilised to cover up the loss incurred by the Jupiter by reason of its securities worth about Rs. 45,00,000 assigned in favour of Accused 7 and also by reason of the securities

worth Rs 20 00 000 alleged to have been sold to the Empire on 27th November, 1950. It is, therefore, manifest, and indeed it is not disputed before us now, that Shankarlal and his co-conspirators, whoever, they may be, had conspired together and lifted large amounts of the Empire and put them into the Jupiter coffers to cover up the loss caused to it by their fraud. Therefore, in these appeals we proceed on the basis that there was a conspiracy as aforesaid and the only question for consideration is whether all or some of the appellants were parties to it.

Before dealing with the individual cases, as some argument was made in regard to the nature of the evidence that should be adduced to sustain the case of conspiracy, it will be convenient to make at this stage some observations thereon. Section 120 A of the Indian Penal Code defines the offence of criminal conspiracy thus:

When two or more persons agree to do or cause to be done an illegal act or an act which is not illegal by illegal means such an agreement is designated a criminal conspiracy.

The essence of conspiracy is therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence. But section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. The said section reads:

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong anything said, done or written by any one of such persons in reference to their common intention after the time when such intention was first entertained by any one of them is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a *prima facie* evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression 'in reference to their common intention' is very comprehensive and it appears to have been designedly used to give it a wider scope than the words 'in furtherance of' in the English law, with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only 'as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it'. It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short the section can be analysed as follows: (1) There shall be a *prima facie* evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy, (2) if the said condition is fulfilled anything said, done or written by any one of them in reference to their common intention will be evidence against the other, (3) anything said, done or written by him should have been said, done or written by him

after the intention was formed by any one of them ; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it ; and (5) it can only be used against a co-conspirator and not in his favour.

With this background let us now take the evidence against each of the appellants and the contentions raised for or against him. But it must be stated that it is not possible to separate each of the accused in the matter of consideration of the evidence, for in a case of conspiracy necessarily there will be common evidence covering the acts of all the accused. We may, therefore, in dealing with some of the accused, consider also the evidence that will be germane against the other accused.

We shall first take the case of Accused 6, Caveeshar, who is the appellant in Criminal Appeal No. 82 of 1962. So far as this appellant is concerned the learned Sessions Judge found that he was a member of the conspiracy and the High Court confirmed that finding. It is the practice of this Court not to interfere with concurrent findings of fact even in regular appeals and particularly so in appeals under Article 136 of the Constitution. We would, therefore, approach the appeal of this accused from that perspective.

Learned Counsel for this appellant argued before us that the said accused was convicted by the Sessions Judge for being a member of the conspiracy in the Jupiter case in respect of his acts pertaining to that conspiracy and therefore he could not be convicted over again in the present case on the basis of the facts on which the earlier conviction was founded ; in other words, it is said that he was convicted in the present trial for the same offence in respect of which he had already been convicted in the Jupiter case and such a conviction would infringe his fundamental right under Article 20 (2) of the Constitution, and in support of this contention reference was made to certain decisions of the Supreme Court of the United States of America. The said Article reads :

“ No person shall be prosecuted and punished for the same offence more than once. ”

The previous case in which this accused was convicted was in regard to a conspiracy to commit criminal breach of trust in respect of the funds of the Jupiter and that case was finally disposed of by this Court in *Sardul Singh Caveeshar v. State of Bombay*¹. Therein it was found that Caveeshar was a party to the conspiracy and also a party to the fraudulent transactions entered into by the Jupiter in his favour. The present case relates to a different conspiracy altogether. The conspiracy in question was to lift the funds of the Empire, though its object was to cover up the fraud committed in respect of the Jupiter. Therefore, it may be that the defalcations made in Jupiter may afford a motive for the new conspiracy, but the two offences are distinct ones. Some accused may be common to both of them, some of the facts proved to establish the Jupiter conspiracy may also have to be proved to support the motive for the second conspiracy. The question is whether that in itself would be sufficient to make the two conspiracies the one and the same offence. Learned Counsel suggests that the question raised involves the interpretation of a provision of the Constitution and therefore the appeal of this accused will have to be referred to a Bench consisting of not less than 5 Judges. Under Article 145 (3) of the Constitution only a case involving a substantial question of law as to the interpretation of the Constitution shall be heard by a Bench comprising not less than 5 Judges. This Court held in *State of Jammu and Kashmir v. Thakur Ganga Singh*², that a substantial question of interpretation of a provision of the Constitution cannot arise when the law on the subject has been finally and effectively decided by this Court. Two decisions of this Court have construed the provisions of Article 20 (2) of the Constitution in the context of the expression “ same offence ”. In *Leo Roy Frey v. The Superintendent, District Jail, Amritsar*³, proceedings were taken against certain persons in the first

1. (1957) S.C.J. 780 : (1957) M.L.J. (Cr.) 739 : (1958) S.C.R. 161.
2. (1960) S.C.J. 231 : (1960) M.L.J. (Cr.) 180 : (1960) 1 M.L.J. (S.C.) 67 : (1960) 1 An.

W.R. (S.C.) 67 : A.I.R. 1960 S.C. 356.
3. (1958) M.L.J. (Cr.) 289 : (1958) S.C.J. 301 : (1958) S.C.R. 822, 827.

instance before the Customs Authorities under section 167 (8) of the Sea Customs Act and heavy personal penalties were imposed on them. Thereafter, they were charged for an offence under section 120-B of the Indian Penal Code. This Court held that an offence under section 120 B is not the same offence as that under the Sea Customs Act. Das, C J, speaking for the Court, observed

"The offence of a conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed. Equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."

This Court again considered the scope of the words "same offence" in *The State of Bombay v S L Apte*¹. There the respondents were both convicted and sentenced by the Magistrate under section 409 of the Indian Penal Code and section 103 of the Insurance Act. Dealing with the argument that the allegations of fact were the same, Rajagopala Ayyangar, J, rejecting the contention, observed on behalf of the Court

"To operate as a bar the second prosecution and the consequential punishment thereunder, must be for 'the same offence'. The crucial requirement therefore for attracting the Article is that the offences are the same, i.e., they should be identical. If however, the two offences are distinct, then notwithstanding that the allegations of fact in the two complaints might be substantially similar the benefit of the bar cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out."

This decision lays down that the test to ascertain whether two offences are the same is not the identity of the allegations but the identity of the ingredients of the offences. In view of the said decisions of this Court, the American decisions cited at the Bar do not call for consideration. As the question raised has already been decided by this Court, what remains is only the application of the principle laid down to the facts of the present case. We cannot, therefore, hold that the question raised involves a substantial question of law as to the interpretation of the Constitution within the meaning of Article 145 (3) of the Constitution.

In the present case, applying the test laid down by this Court, the two conspiracies are not the same offence. The Jupiter conspiracy came to an end when its funds were misappropriated. The Empire conspiracy was hatched subsequently, though its object had an intimate connection with the Jupiter in that the fraud of the Empire was conceived and executed to cover up the fraud of the Jupiter. The two conspiracies are distinct offences. It cannot even be said that some of the ingredients of both the conspiracies are the same. The facts constituting the Jupiter conspiracy are not the ingredients of the offence of the Empire conspiracy, but only afford a motive for the latter offence. Motive is not an ingredient of an offence. The proof of motive helps a Court in coming to a correct conclusion when there is no direct evidence. Where there is direct evidence for implicating an accused in an offence, the absence of proof of motive is not material. The ingredients of both the offences are totally different and they do not form the same offence within the meaning of Article 20 (2) of the Constitution and, therefore, that Article has no relevance to the present case.

The next question is whether this appellant was a party to the Empire conspiracy. He was a close associate of Shankarlal in the political field, he being the President of the Forward Bloc and Shankarlal being its Vice President. That is how they were drawn together. There is also evidence that out of the 63,000 shares of the Jupiter that were purchased in August, 1949 by Shankarlal Group, 4,473 shares were allotted to this appellant. It is, therefore, clear that Accused 6, though *ex facie* he was neither a Director nor an office bearer in the Jupiter, had heavy stakes in it. We have already noticed that after the purchase of the said shares

¹ (1961) 1 S.C.J. 685 (1961) 1 M.L.J. (1961) M.L.J. (Cri) 331 (1961) 3 S.C.R. 107
(S.C.) 210 (1961) 1 An.W.R. (S.C.) 210 114

from and out of the Jupiter funds, a bogus loan in the name of Accused 6 for a sum of Rs. 25,15,000 was shown in the Jupiter accounts and latter on it was substituted by other manipulations. That he was a willing party to these manipulations is also made clear by Exhibits Z-305-A and Z-125 which record the second loan in favour of this accused. Exhibit Z-305-A is a receipt passed by Accused 6 to the Tropical acknowledging the receipt of a sum of Rs. 26,15,563-10-6 in full settlement of the amount advanced by him to them against the proposed purchase of their building and plots of land. It is not disputed that this transaction was only a bogus one brought about to cancel the fictitious loan given to Accused 6; and this indicates that this accused was taking active part in the manipulations of the Jupiter accounts. Exhibit 125 is another receipt passed by Accused 6 to the Jupiter for having received a sum of Rs. 5,30,000 on 27th December, 1949. This is, as we have already stated earlier, one of the devices adopted to cancel the earlier bogus loans. This also establishes the complicity of this accused in the Jupiter transactions. It is, therefore, clear that Accused 6 had an ample motive to join the conspiracy to lift the Empire funds to cover up the defalcations made in the Jupiter. Exhibit F dated 17th March, 1949 is a letter written by Accused 6 to one Chopra, a broker, wherein he authorized the said Chopra to negotiate the purchase of majority of the shares of the Empire or at least a minimum of 2,200 shares of the above Company from M. S. Ram Ratan Gupta, Gulab Chand Jain and/or their nominees or friends. He informed Chopra that the rate would be approved "by us" from time to time and that he would be paid a consolidated brokerage of Rs. 40,000. Though this letter was written about 1½ years before the alleged conspiracy, it was subsequent to 29th January, 1949, the date when the Jupiter securities were purchased from and out of the Jupiter funds by making necessary manipulations in their accounts. This was the first indication of the conception of the scheme of conspiracy to get at the Empire funds. This shows that, along with Shankarlal, Accused 6 was also a brain that gave the direction to the conspiracy. The letter also indicates that Accused 6 expected that the purchase of the majority of shares of the Empire would take considerable time and also that it would be by bits or in small blocks, for he said in the letter that the rate would be approved by them from time to time. The words "by us" in the letter further show that he was not writing the letter only for himself but on behalf of a group and he was only one among many who were seeking to purchase the Empire shares. P. W. 1, who was doing business in the name of Chopra & Co., deposed in regard to this document. He said that in pursuance of the authority given to him by Accused 6 he negotiated for the purchase of the Empire shares; he also spoke to the fact that the words "by us" in the authority meant the group consisting of Accused 6, Shankarlal and Accused 1 and that he corresponded with Shankarlal subsequently in respect of the said negotiations. In the said circumstances, the time lag between the letter and the period of conspiracy for which the accused are charged is not in itself sufficient to detract from its evidentiary value. In the context of the subsequent events this letter certainly connects Accused 6 with the Empire fraud.

The next circumstance against Accused 6 is that out of the sum of Rs. 20,00,000 paid by the Empire to the Jupiter as the price for the alleged purchase of securities of the former from the latter went to cancel the false entries of transactions made in the Jupiter accounts. We have already stated earlier that the original loan of Rs. 25,15,000 alleged to have been given to Accused 6 was, by subsequent manipulations, wiped out by four different transactions, including a fresh loan in favour of this accused. The said money was used to cover up the loan of Rs. 5,00,000 alleged to have been given to Raghavji and the alleged purchase of 54,000 Tropical shares for Rs. 14,00,000. This transaction is a further proof that with the knowledge of Accused 6 the Empire funds were utilised to cancel the false transactions entered into by him and others and to cancel the false entries made in the Jupiter accounts.

What is more, he had taken a keen and active interest in inducing the Chief of Bagarian to take a heavy loan of Rs. 77,50,000 on the security of his properties with a view to cover the misappropriations of the Empire funds. The

details of the said alleged loan and the part taken by him we shall consider at a later stage, but briefly the transactions were entered into under the following circumstances. On 24th January, 1951 there was a police raid on the Empire Office. On 30th January, 1951, the Directors of the Empire sanctioned a loan of Rs 77,50,000 to the Chief of Bagarian who, it is said, agreed to set-off the amount of the earlier loans amounting to Rs 71,00,000 and take only the balance, for it is said, that there was some arrangement between him and Shankarlal that he would pay that amount directly to the Chief of Bagarian. P W 85 is Jagdishnaray in Konotia, an architect practising in Delhi, and his evidence is as follows. He met Accused 6 who told him that a valuation of the estate of the Chief of Bagarian had to be made and asked him to accompany him for that purpose, he was introduced to Uttam prakash and Ardhamansingh, the Chief of Bagarian, who took him to the estate, the witness took a rough measurement of the properties shown by Ardhamansingh, he gave the original report of valuation to Accused 6 and a copy of it to Uttam prakash. Haridhansingh, the son of the Chief of Bagarian, was examined as P W 99 and he deposed that he talked with Accused 6 on several occasions to find some financier to help him to develop his lands, that in February, 1951 he was introduced to Shankarlal and that during his conversation with him Accused 6 was also present, he further said that, though he had not received the money, he executed promissory notes in favour of the Empire to the effect that he had received the value, thereof in cash because Shankarlal told him that the money would be paid in instalments by the Empire and that he would send the promissory notes as and when money was paid to him from time to time. He admitted that he signed the documents though he did not know Shankarlal, as he was assured by Accused 6 that he could do so. Except for immaterial variations, he stuck to the version in the cross-examination. P W 98 was the Chief of Bagarian. He knew Accused 6 and was related to him. He was also at one time the Chairman of the Peoples Insurance Company, Ltd., of which Accused 6 was the Managing Director. The evidence of these three witnesses establishes that Accused 6 was related to the Chief of Bagarian, that he introduced the son of the Chief of Bagarian to Shankarlal and induced him to enter into a huge transaction with the Empire by mortgaging his properties with a condition that the amounts lent, except a few lakhs, would not be paid to him directly, but Shankarlal would do so later on and that he took active interest in pushing through the transaction by getting the properties of the son of the Chief of Bagarian valued by an architect. The fact that this transaction did not ultimately fructify is not material, what is important is that Accused 6 used his influence and relationship with the Chief of Bagarian and his son, got a resolution passed by the Empire sanctioning a huge sum of Rs 77,50,000 to the son of the Chief of Bagarian to cover up the earlier fraud presumably to escape the inevitable criminal proceedings indicated by the police raid. If Accused 6 was not a party to the conspiracy, why did he take such urgent steps to avert the danger? Having regard to the other circumstances his active interest in promoting this loan probalizes his hand in the conspiracy.

Both the Courts on the basis of the aforesaid evidence came to the conclusion that Accused 6 was a member of the conspiracy and we cannot say that there is no evidence on which the Courts could have come to the conclusion to which they did. There are no permissible grounds for upsetting this finding under Article 136 of the Constitution.

As regards the sentence passed against this accused, the Sessions Judge sentenced him to undergo rigorous imprisonment for a period of 5 years, whereas he sentenced Accused 7, 8 and 9 to undergo rigorous imprisonment for a period of 3 years only. We do not see any justification for this distinction between the said accused in the matter of punishment. Accused 6 had already been convicted and sentenced in the Jupiter case, and on the evidence it does not appear that he had taken a major part in the Empire conspiracy, though he was certainly in it. In the circumstances we think that a sentence of 3 years' rigorous imprisonment would equally suffice.

in his case. We therefore, modify the sentence passed on him and sentence him to undergo rigorous imprisonment for 3 years. Subject to the aforesaid modification, the appeal preferred by Cavechshar, Accused 6, is dismissed.

We shall now proceed to consider the appeal preferred by Damodar Swarup, Accused 7, *i.e.*, Criminal Appeal No. 83 of 1962. Accused 7 was the Managing Director and Chairman of the Empire during the period of the conspiracy. On 17th October, 1950, he was elected the Chairman of the Board of Directors of the Empire and appointed as Managing Director on a salary of Rs. 2,000 per month for a period of one year. He was removed from the post of Managing Director at the meeting of the Board of Directors held on 12th March, 1951. The misappropriation of the funds of the Empire, which is the subject-matter of the conspiracy, were committed during the period of his Managing Directorship *i.e.*, between 20th September and 31st December, 1950. The prosecution case is that Accused 7 was a party to the conspiracy, whereas the defence version is that he was a *benamidar* for Shankarlal, that he took part in the proceedings of the Board of Directors *bona fide* believing that there was nothing wrong, that the resolutions were implemented by Accused 10 under the directions of Shankarlal and that the moment he had a suspicion that there was some fraud, he took immediate and effective steps not only to prevent the rot but also to investigate and find out the real culprits. The question is which version is true.

It would be useful to have a correct appreciation of the evidence to know the antecedents of Accused 7. Shri Sri Prakasa, the erstwhile Governor of Bombay, who has been associated with Accused 7 in his political life, was examined as a defence witness and he gave some facts of the past life of the Accused 7. According to him he and Accused 7 were closely associated in the work of the U.P. Provincial Congress Committee and for some time Accused 7 was also the President of the said Committee, he was in jail for nearly 25 years in connection with his political work, he was also connected with the Kashi Vidyapith for 3 or 4 years from 1924 or 1925 onwards, he was arrested in, what is called, the Kazori case and was tried along with others for the offence of conspiracy to loot the Government Treasury during 1929-30 when the witness was the General Secretary of the U.P. Provincial Congress Committee, Accused 7 was one of the active workers. Shri Jawaharlal Nehru, the present Prime Minister of India, deposed that Accused 7 was a member of the Parliament and also of the Constituent Assembly. It may, therefore, be taken that Accused 7 has vast experience of men and matters and had occupied important position in the public and political life of the country. Accused 7 has described in his written statement filed in the Sessions Court how he came into contact with Shankarlal. Being a political leader, he came into contact with various national leaders of eminence, one of them being Shankarlal; on one occasion when this accused was seriously ill after his release from jail, he was attended to by Shankarlal and his wife at their residence; sometime prior to October, 1950 Shankarlal expressed to him that he had a plan to purchase the shares of the Empire and requested him to be its Managing Director *benami* for him, as he could not in law be the Managing Director for two companies; when he expressed his unwillingness, as, if he accepted it, he would have to give up his political career, Shankarlal promised that he would personally direct the operations and that he would give him the assistance of a competent Secretary, who would practically carry on the administration with the least possible demand on his time, and that he would make an alternative arrangement to relieve him soon of the responsibility so that he would be free to devote himself completely to his political life. It may, therefore, be said that Accused 7 was an important figure in the political field and that he accepted the Managing Directorship of the Empire as he was a friend of Shankarlal and was, to some extent, beholden to him.

The first document which throws some light as to how this accused had been inducted into the transaction of the purchase of the controlling shares of the Empire is Exhibit-53 dated 20th September, 1950. It is a letter written by Shankarlal

to Kaul, Accused 1. Shankarlal said therein that he understood that Kaul was not prepared to sell Rs 45,00,000 worth of Jupiter securities direct to Accused 7 but as Chairman and Managing Director of Jupiter he was ordering him to sell the said securities to Accused 7 and endorse them in his favour and that as he would be returning the securities in two or three days, no Board resolution was necessary for that purpose. This letter clearly shows that before 20th September 1950 Accused 7 agreed to the endorsement of Jupiter securities in his favour. Exhibit 234 is a letter dated 21st September, 1950, written by Accused 7 to Kaul. In that letter Accused 7 stated that Shankarlal asked him to proceed to Bombay immediately, but, as he was under the impression that the plan had not materialised he had undertaken to make certain important engagements and, therefore, he could proceed to Bombay only in the first week of October, and reach that place on 4th of that month. He enquired of him to let him know by wire the latest date by which he should reach Bombay and the number of days for which he should stay there in the first instance. It was also mentioned in that letter that it was a long time since he and Shankarlal had a talk about the 'affairs'. This letter shows that Accused 7 had a discussion with Shankarlal some time before 21st September, 1950 and that he had agreed to the plan suggested by him. It also indicates that Accused 7 was led to believe that he had to stay at Bombay for a fairly long time. Three words in this letter are commented upon, viz, "plan", "affairs" and "materialized". The use of the cryptic terms 'plan' and "affairs" read along with the expression "materialized" savours of secrecy and conspiracy. This letter in itself may not be decisive of the question that Accused 7 had knowledge of the entire sinister plan of misappropriating the Jupiter funds, but, it also with Exhibit 53, leaves no room to doubt that Accused 7 knew that it was part of the plan to endorse the Jupiter securities in his favour and that out of the moneys raised on the said securities, the controlling shares of the Empire would be purchased at Bombay and that he had to go to Bombay for that purpose. Exhibit-6 dated 25th September, 1950, is a letter written by Kaul to Accused 7 in reply to Exhibit Z-234. Therein he reminded him that the matter practically materialised and that Accused 7 had to go to Bombay, and stay there permanently. Kaul wrote another letter to Accused 7 on 12th October, 1950, wherein he asked the latter to go to Bombay on the 15th and stay at Hotel Majesty and that he had to take charge on the 16th. He also informed Accused 7 that nothing could be done without his presence, as he was the principal party in the transaction. Accused 7 was also told that Kaul and Shankarlal would be at Bombay. Presumably, Accused 7 wrote to Kaul for the postponement of the meeting at Bombay to 19th. Kaul gave two wires to Accused 7 (Exhibit 49) telling him that the matter could not be postponed to 19th and that Accused 7 should go to Bombay on the 15th evening. In the said wires he stated that if Accused 7 did not turn up on that date, they would lose lakhs and would suffer irreparable loss. If the bargain fell through, why would, to use a neutral term, Shankarlal Group lose lakhs and suffer irreparable loss? The purchase of the controlling shares was, therefore, mainly intended to prevent loss to that group. What was that loss? It can only be the loss that might result if they failed to control the Empire and thereby cover up the fraud of the Jupiter and if that bargain had fallen through the fraud of the Jupiter might be exposed. The other loss to the group could possibly be the rise in the price of the Empire shares. But there is nothing on the record to show that they were purchasing the shares of the Empire at a low price. In the circumstances, it is reasonable to infer that Accused 7 knew that the plan, if not carried out, would cause loss to Shankarlal Group. It is not disputed that securities to the tune of Rs 45,00,000 belonging to the Jupiter were endorsed by Kaul in favour of Accused 7 who in his turn endorsed them in favour of the Punjab National Bank, Ltd., Bombay, to open a cash credit account therein.

Pausing here, one may ask the question whether Accused 7 could be ignorant of the fact that the securities of the Jupiter could not be utilized for the purchase of the controlling shares of the Empire in his name. Learned Counsel appearing for him argued that he thought that the securities belonged to Shankarlal and that they

were endorsed over to him only in order to purchase the controlling shares of Empire *benami* for Shankarlal. Admittedly the securities were not endorsed over to Shankarlal as they should have been, if he had purchased them. If he had paid the money to the Jupiter in the name of Accused 7 and got the said securities directly endorsed to Accused 7, it would mean that Shankarlal had the ready cash of about Rs. 45,00,000 with him. If he had that much cash, what was the necessity to adopt the circuitous method of purchasing the securities of the Jupiter, deposit them in the Bank as security, raise money thereon and then pay it towards the consideration for the purchase of the shares of the Empire? The easier method would have been to put the cash in the Bank itself in the name of Accused 7 and purchase the Empire shares directly in his name. If by doing so, the real character of the transaction would be known, equally would it be known if the money was raised on the basis of the Jupiter securities endorsed over in the name of Accused 7. It could, therefore, have been obvious to a man of ordinary intelligence that the securities belonged to the Jupiter and that they were endorsed over to him for the purpose of raising money for the purchase of the Empire shares for and on behalf of Shankarlal Group. It is, therefore, very difficult to accept the contention that Accused 7 honestly believed that the said securities were the property of Shankarlal.

Looking at the transaction from an aspect most favourable to Accused 7, one cannot but come to the conclusion that he thought that there was nothing wrong in utilizing the securities of one company for purchasing shares of another company for the benefit of others, as he believed that Shankarlal would as early as possible restore the said securities or their value to the Jupiter. This act of Accused 7 is a decisive circumstance against him and the explanation offered by him is too thin for acceptance.

Accused 7, thereafter, endorsed the said securities in favour of the Punjab National Bank, Ltd., and executed promissory notes in favour of the Bank and opened a cash-credit account therein on which he drew cheques to pay the price of the Empire shares to Ramsharan Behari Lal Group. Exhibit Z-9 dated 5th October, 1950 is the agreement entered into between Behari Lal Ramsharan on the one part and Damodar Swarup on the other part whereunder the said shares were sold in favour of the latter. In this context the evidence of Naurangrai, a broker who brought about the said transaction may be considered. He was examined as P.W. 22. He said that he came to Bombay on 14th or 15th October, 1950 and that the object of his visit was to see that the balance of the consideration for the agreement was paid to Ram Ratan and delivery of the shares was taken. He met Shankarlal as Dhanraj Mahal and at that time Accused 1 and 7 were present. Shankarlal told him that he had arranged to pledge Government securities of the Jupiter with the Punjab National Bank for raising money. If this witness was speaking the truth, this evidence clearly imputes knowledge to Accused 7 of the fact that Jupiter securities were utilized for raising money. There is nothing inherently wrong with this evidence. As the broker was pressing for payment of money to the sellers of the shares, it was natural for Shankarlal to tell him that he was raising money on the said securities to pay them. The presence of Accused 7 would not have deterred him from saying so, if Accused 7 had knowledge of the fact. The circumstances already noticed by us probabalizes his knowledge rather than his ignorance of the said fact and this evidence is consistent with that inference. But in the cross-examination the statement made by this witness to the police was put to him. There he had said that he returned to Bombay on the 16th with the intention of getting his commission and that on his arrival Shankarlal had made arrangements for pledging the securities. If he had returned only on the 16th, it is argued, he could not have met Shankarlal on the 15th, and that one or other of the dates must be a mistake. Though we would not have acted upon the evidence of this witness in regard to this matter if that was the only piece of evidence, we do not see any reason to disbelieve his evidence as regards this meeting Shankarlal when he was with Accused 7. The conversation he had with Shankarlal was quite appropriate and natural in the circumstance under which he met him. Learned Counsel for Accused 7 reminds us that

the said accused is deaf and that the said conversation might have escaped his attention. But there is no material on which we can judge the intensity of his defect. Be it as it may, it is only a piece of evidence which must be judged along with the other evidence in the case.

Then we come to the evidence relating to the period after Shankarlal Group took control of the Empire. After Damodar Swarup purchased the controlling shares, only the qualifying shares for Directorship were kept with him and the rest were endorsed over to other persons, qualifying shares were endorsed in the names of Accused 8 and 9. On 17th October, 1950 at the meeting of the Board of Directors of the Empire Damodar Swarup, Accused 7, was elected Chairman of the Company and Accused 7 was co-opted as Director. Accused 7 was also appointed the Managing Director on a salary of Rs. 2,000 per month for one year and Accused 10 was appointed the Secretary of the Empire on a salary of Rs. 1,350 per month. The Managing Director was authorized to purchase a car costing not more than Rs. 15,000 for his use. Under one of the resolutions passed in that meeting the Managing Director was authorized to open accounts in bank or banks as may be deemed necessary for the Company and to operate singly on any of the accounts of the Empire on any of the Bank or Banks and to negotiate all bills, notes, etc. The Secretary was also authorized to operate on any account of the Company with any bank. In this meeting Accused 7 was made the Chairman of the Board of Directors and the Managing Director of the Company with all the powers of Managing Director to open accounts, to operate on them and to negotiate bills, notes etc. Shankarlal was on all accounts a very powerful and able man who made a mark not only in politics but also in business. Would such a man make Accused 7 the Managing Director of the Empire with extensive powers if he was not a conspirator? If Accused 7 was not a party to the colossal fraud, would Shankarlal and his Group take the risk of certain chance of disclosure by placing him at the helm of affairs? It is said that he was a figurehead and the real and effective man was the Secretary. However competent the Secretary may be, Accused 7 is also a competent man in his own way. With his vast powers, it is impossible to assume that such an intelligent man as Shankarlal would have believed that Accused 7 could not see through the game though not immediately, but sooner or later. Soon after the new Directors took charge of the Empire negotiations were started between the Jupiter and the Empire for the sale of certain securities worth Rs. 20,00,000 through one broker Kohli, who was carrying on business in the firm name of Vilaytlal Kohli & Co., Exhibit Z-218 dated 26th October, 1950, is a letter sent by the Secretary of the Empire in reply to Kohli's enquiry in his letter dated 19th October, 1950 whether the Empire was willing to buy the securities. It was stated therein that his suggestion was placed before the Managing Director and the same had been approved by him and that they were prepared to buy the securities and make an advance payment. It is said that the reference to the Managing Director was only made in conformity with form. At the Directors' meeting held on 27th November, 1950 a resolution was passed to the effect that "the following further investments made with the consent of the Managing Director be recorded and approved". The proceedings wherein that resolution was passed in Exhibit Z-206 L. In that meeting Accused 7 was present. One of the investments approved was the purchase of Rs. 20,00,000 worth of Government securities from the Jupiter. Soon after the alleged purchase, two bearer-cheques (Ex. Z 216) dated 26th October, 1950 and 27th October, 1950 for Rs. 15,00,000 and Rs. 5,00,000 respectively were issued and cashed to cover up the defalcation made in the Jupiter. The securities were delivered only on 27th November, 1950. This transaction discloses that soon after Accused 7 took charge of the Empire as Managing Director, Rs. 20,00,000 from the Empire were diverted to the Jupiter under the pretext of purchase of shares which were delivered only one month thereafter. This transaction coming as it was so soon after Accused 7 became the Managing Director of the Empire is consistent with his knowledge that the main purpose of taking control of the Empire was to divert its money to Jupiter. There was also no explanation why so soon after Accused 7 took charge

as Managing Director of the Empire, the Secretary should have tried to deceive him by inserting a false recital in the letter he wrote to the broker that his letter for purchasing securities and making advance payment had the approval of the Managing Director. At that time they were on best terms and there was no conflict between them. We are, therefore, inclined to hold that Accused 7 had knowledge of the said transaction and was a willing party to make the advance payment of Rs. 20,00,000 to the Jupiter, though the securities were not delivered. It is not disputed that this was admittedly an exception to the practice obtaining in the Empire not to make advance payments against future deliveries.

At the meeting of the Board of Directors held on 27th November, 1956 at which Accused 7 presided, another resolution was passed and it was :

"The sales of 3% Government loan 1953/65 of the face value of Rs. 90,60,000 at Rs. 99-4-0 per cent. through the Punjab National Bank, Ltd., Bombay, was approved and confirmed. The following arrangements made by the Managing Director with the Bank was recorded :

That the Bank should credit immediately the sale proceeds of the loan referred to above at the rate mentioned above less Bank's commission at 1/16 per cent on the face value and a margin of 5% and further subject to the necessary adjustments by way of interest less income-tax due. The margin of 5% reserved by the Bank might have to face in disposing off the whole lot of Rs. 90,60,000 against the corresponding purchase of other securities."

This arrangement is described as marginal account. Exhibit Z-368 is a memorandum sent by the Punjab National Bank to the Empire giving an abstract of the details of the said transaction. It will be seen from this that price of this large block of securities was credited to the Empire and 5 per cent of the same was kept as margin money to cover the loss the Bank might incur if and when those securities were actually sold. This is the first time in its history this Bank entered into such a speculative transaction and for that purpose large block of securities were removed from the long standing safe custody account of the Imperial Bank and transferred to the Punjab National Bank. It became necessary to enter into this extraordinary transaction with the Punjab National Bank as large defalcations made in the Jupiter required to be covered up. The resolution in terms says that the Board approved the above arrangement made by the Managing Director. It is impossible to believe that this extraordinary transaction escaped the attention of the Managing Director.

On 18th December, 1950 another meeting of the Board of Directors of the Empire was held and Accused 7 again presided over it. In that meeting the minutes of the previous meeting held on 27th November, 1950, were read and confirmed. The Managing Director did not question at this meeting the correctness of the statement recorded in the earlier resolution that the arrangement was approved by him. It is rather difficult to believe that this huge transaction which is much out of the way, escaped his attention or that he blindly took part in the meetings believing in *bona fide* that everything was going on regularly.

What is more, this large amount was operated upon for advancing loans to bogus debtors. In the meeting of the Board of Directors held on 27th November, 1950, six propositions for advance of loans on equitable mortgages of properties totalling to Rs. 28,20,000 were placed before it. The Board resolved to lend the amounts to the said applicants. It is not disputed before us that the said loanees were all fictitious persons and indeed the moneys advanced on those loans went into the coffers of the Jupiter. Under the resolutions the only conditions imposed for granting the loans was that they were subject to the title of each of the borrowers to his respective property being found clear and satisfactory by the Solicitor or Counsel approved by the company. It would be seen that the loans were sanctioned without any valuation report or any investigation whatsoever. Learned Counsel for Accused 7 contends that it was the practice of the Board to sanction loans subject to the title being found clear on investigation and that after the resolutions were passed, it was the duty of the Secretary or the Managing Director to consult the Solicitors or the legal advisers of the Company and ask for their report about

the titles of the properties concerned and that his client *bona fide* believing that the said practice would be followed did not raise any objection. It is true that the record discloses many instances wherein loans were granted subject to scrutiny of title by the legal advisers of the Company, but in the resolutions in question a little variation was made which though appears innocuous gives room for fraud as it stated that the scrutiny of title might be made not by the Company's Advocates but by any Advocate approved by the Company. Be it as it may, the real point is that soon after Accused 7 took over the management of the Company, when large block of securities of the Company were sold and applications for loans of huge amounts were made, if Accused 7 was not a party to the fraud, he would certainly have insisted upon further scrutiny in the matter, particularly in regard to the properties before the loans were advanced. This attitude on his part may be contrasted with that adopted by him when the application on behalf of Messrs Jaswant Straw-Board Mills, Ltd., was placed before him on 4th November, 1950, when it was resolved that the loanes should be asked to produce additional security. This difference in attitude on the 27th has a sinister meaning. On 18th December, 1950 the Secretary placed before the Board of Directors six propositions received for advance of loans by the Company on equitable mortgage of property comprising buildings see Exhibit Z 206M. The total of the amounts came to Rs 42 80 000. Accused 7 was present at that meeting. The minutes of the previous meeting were read and approved and the Board resolved to give the loans subject to the title of the borrower to the property being found clear and satisfactory by the Solicitor or Counsel approved by the Company. It is also not denied that the applicants were all fictitious persons and the money really passed on to the Jupiter. The same argument advanced in connection with the earlier six loans are again repeated and for the same reasons we find it difficult to hold that Accused 7 *bona fide* believed that the resolutions were passed in the usual course. The two sets of loans together total about Rs 71 00 000. The fact that within a short period after Accused 7 and his friends took over the management of the Company securities of the Company worth Rs 90 00 000 were sold and Rs 71,00,000 were lent to others must have been an eye opener to an honest Managing Director. It is impossible to believe that any Secretary or an Office bearer of the Company would conceive and execute such a huge fraud if he was not certain that the Managing Director was also in it. The raising of the money on the securities of the Jupiter endorsed in his favour, the purchase of the controlling shares of the Empire in his name from and out of that money, the taking over of the management of the Empire by nominally allotting from and out of the shares so purchased 20 qualifying shares to each one of the accused viz, accused 7, 8 and 9 his approval of the resolution soon after he became the Managing Director to advance a sum of Rs 20 00 000 to Jupiter against a subsequent delivery of securities and also his approval of the resolution to sell Rs 90 00 000 worth of Empire securities and opening a marginal account in the Punjab National Bank, Ltd., and the resolutions sanctioning loans of Rs 71,00 000 to applicants without proper scrutiny if taken together disclose a scheme of fraud to which he was a party.

Exhibit 622 is a letter dated 19th December, 1950 which throws further light on the knowledge of the accused to the conspiracy. The letter was addressed by Accused 7 to the broker. It reads

I beg to confirm having purchased from you the following securities which I have already received from you duly endorsed in my favour by your seller

Rs 2 00 000/ 2½% 1954 loan at 98/12/

Rs 2 75 000/ 3%, 1970/75 Loan at 97/8/

Rs 23 40 000/ 3%, Convers on 1946 Loan at Rs 93/

Rs 9 50 000/ 3% Bombay 1962 at 98/2/

Rs 1 00 000/ 3% 1963/65 Loan at Rs 98/0/6

As per your des re I am arranging to make the payment for the above securities direct to your seller the Managing Director of the Jupiter General Insurance Co. Ltd., as I am leaving for Delhi and they will pass you the necessary receipts for the payment received.

The securities which are worth about Rs. 38,65,000 correspond to some of the securities endorsed over to Accused 7 for raising money for purchasing the controlling shares of the Empire. This letter shows that Accused 7 was paying the price of the securities direct to the seller, the Managing Director of the Jupiter, indicating thereby that he knew that the securities were those of the Jupiter and not of Shankarlal. If this letter was true, it would clearly impute knowledge to Accused 7 that the securities endorsed over to him were those of the Jupiter. It is common case that this document was not utilized for the purpose for which it was intended, but was found with Accused 10. When this was put to Accused 7 he said :

"I do not know Vilayatilal Kohli & Co. and had not met any of those persons. This typed letter was also put before me by Bhagwan Swarup asking me to sign it as a Benamidar for Shankarlal. I felt a bit surprised as to why Shankarlal wanted this letter to be signed by me. I inferred that perhaps he wanted to show the outside world that I was the real purchaser of the Company and so I signed the letter."

By this answer Accused 7 admits that he had signed the letter knowing its contents. Learned Counsel for this accused contends that this letter was not required for any purpose of the Empire and no explanation was given why it should be found with Accused 10 and that on the date which it bears Accused 7 was not in Bombay. But this criticism would not answer the clear implication of the knowledge of Accused 7 of the contents of the letter, for whatever purpose it might have been executed it was admittedly signed by Accused 7 with the knowledge of its contents and this certainly supports the inference that he had knowledge of the fraud.

Learned Counsel for Accused 7 contends that the following two important circumstances in this case established that Accused 7 was a victim of circumstances and that he was innocent : (1) Two prominent public men of this country with whom the accused worked gave evidence that he was a man of integrity ; and (2) the accused took active steps to unravel the fraud and to bring to book every guilty person ; if he was a conspirator, the argument proceeds, it was inconceivable that he would have taken such steps, for it would have certainly recoiled on him. We shall consider these two aspects now.

Mr. Sri Prakasa in his evidence said that from what he knew of Damodar Swarup for the last 32 years he was a person of high integrity, noble character and of patriotic fervour. Mr. Jawaharlal Nehru said in his evidence that he knew Damodar Swarup for nearly 40 years and that he had known him in the political field as a very earnest and enthusiastic worker and that he had often been in prison with him and that he always had respect for his sincerity. He added that the accused was a simple man, who was not too clever and who had nothing to do with business and that he was deaf. The evidence of these witnesses establish that in their opinion the accused was a man of integrity, sincerity and simplicity. The question is what is the evidentiary value of good character of an accused in a criminal case. The relevant provisions are section 53 and the *Explanation* to section 55 of the Evidence Act. They read :

"Section 53.—In criminal proceedings the fact that the person accused is of a good character is relevant."

Explanation to section 55.—In sections 52, 53, 54 and 55, the word 'character' includes both reputation and disposition : but except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown."

It is clear from the said provisions that the evidence of general reputation and general disposition is relevant in a criminal proceeding. Under the Indian Evidence Act, unlike in England, evidence can be given both of general character and general disposition. Disposition means the inherent qualities of a person ; reputation means the general credit of the person amongst the public. There is a real distinction between reputation and disposition. A man may be reputed to be a good man, but in

reality he may have a bad disposition. The value of evidence as regards disposition of a person depends not only upon the witnesses, perspicacity but also on their opportunities to observe a person as well as the person's cleverness to hide his real traits. But a disposition of a man may be made up of many traits, some good and some bad, and only evidence in regard to a particular trait with which the witness is familiar would be of some use. Wigmore puts the proposition in the following manner

* Whether when admitted it should be given weight except in a doubtful case or whether it may suffice of itself to create a doubt is a mere question of the weight of evidence, with which the result of admissibility have no concern

But, in any case, the character evidence is a very weak evidence, it cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful in doubtful cases to tilt the balance in favour of the accused or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence. The opinion expressed by the witnesses does credit to the accused, but, in our view, in the face of the positive evidence we have already considered, it cannot turn the scale in his favour.

Learned Counsel strongly relied upon the subsequent conduct of Accused 7 in support of his innocence. On 29th January, 1951, he wrote a letter to the Secretary of the Empire wherein he brought to his notice his suspicions that all was not well with the Company's administration. He asked Chopra & Co., Chartered Accountants, to look into the accounts of the Empire and submit their report. On 21st February, 1951, the said Chartered Accountants submitted a report to him after investigating the accounts of the Empire from about 15th October, 1950 to January, 1951. On the same day he wrote a letter to the Senior Superintendent of Police, Delhi, informing him that he had come to know that a sum of Rs 7,00,000 had been withdrawn from the Civil Lines Branch of the Punjab National Bank without any legal authority and that he had also come to know that large amounts totalling to Rs 71,00,000 had been withdrawn from the said account during the end of December, 1950 and that only a sum of Rs 9,00,000 was then lying to the credit of the Company and that he had given instructions to the Bank not to allow withdrawals by anybody, he requested the police to register a case under section 409 of the Indian Penal Code and promised to give every assistance to the police in their investigation. On 21st February, 1951, he had also addressed a letter to the Controller of Insurance enclosing therein the interim report of the Auditors. He informed him that he was advised to report the matter to the police and that he would inform him of the further developments. On the same day he had written a letter to the Punjab National Bank asking it not to allow any further withdrawal or transfer or operation on cheques drawn or instructions issued by the Secretary or any other person. On 22nd February, 1951, he informed the Punjab National Bank that the Controller of Insurance had issued orders under the Insurance Act forbidding the Company from making any investment from February, 1951 and that it should take notice of the said instructions. On 21st February, 1951, he suspended the Secretary as he got a sum of Rs 9,00,000 odd transferred from the Imperial Bank of India to the Punjab National Bank, Delhi, and as, when he was still on leave, he withdrew a sum of Rs 7,00,000 from the Punjab National Bank without his permission. Exhibit Z-210 A is the minutes of the Board of Directors dated 3rd March, 1951, wherein it was stated that at the instance of the Managing Director it was resolved that all the previous instructions in regard to the operation of all banking accounts of the Company were revoked and it was further resolved that any one of the Directors was authorized to operate jointly with either the Joint General Manager or the Accountant of the Company on the accounts of the Company in any bank. This precaution was taken presumably to prevent further defalcations. It appears that Accused 8, representing the Company, had applied to the Punjab High Court for a prohibitory order preventing the Controller of Insurance from proceeding under section 52-A of the Insurance Act. At the Board meeting it was resolved that the

Solicitors of the Company should be informed that the Company did not wish to proceed with the petition and that they should not take any further action in the matter. On 9th March, 1951, two notices were issued—one at the instance of Accused 7 and the other at the instance of Accused 8 and 9—convening a meeting of the Board of Directors of the Company, as per one notice at 3 P.M. and as per the other at 11 A.M. All the evidence shows that there was a split among the Directors and the Directors were trying to obstruct the Managing Director. Accused 8 tried to get the Board meeting fixed at 3 P.M. cancelled, but Accused 7 did not agree and therefore he and his group called for a meeting at a different time on the same day. Exhibit Z-210-B is the minutes of the meeting of the Board of Directors held on 12th March, 1951. In that meeting Sayana took the Chair and it was resolved that the appointment of Accused 7 as the Managing Director of the Company pursuant to the resolution of the Board dated 17th October, 1950, was terminated with effect from that date; it was also resolved that all the resolutions passed in the Board meeting held on 3rd March, 1951, be treated as cancelled. On 12th March, 1951, Accused 7 wrote a letter to the Commissioner of Police informing him that there were disputes between the Directors and the Managing Director of the Company, that there was disturbance at the meeting specially called for and held at 11 A.M. on that day and that there was likely to be a breach of the peace and, therefore, he was requested to take such steps as were necessary. Exhibit Z-210-A is the minutes of the meeting of the Board of Directors of the Empire held on 27th March, 1951, and in that meeting Sayana took the Chair and Accused 7 was not present. It was resolved therein, *inter alia*, that the order of suspension passed by Accused 7 against Accused 10 was disapproved by the Board and was cancelled and the Secretary was ordered to resume his duties forthwith. It was also resolved that the action taken by Accused 8 in filing a suit in the High Court of Punjab at Simla against the Controller of Insurance was approved and ratified. It also approved and ratified all the actions taken by Accused 8. The letters written by accused 7 complaining against the illegal acts of the Directors were placed before the Board meeting and his complaints were rejected. On 13th May, 1951, Accused 7 filed an affidavit in the High Court of Judicature for Punjab at Simla wherein he gave the various attempts made by him to prevent the continuation of the fraud in the Empire and the obstructive tactics adopted by the other Directors. The Empire Company, represented by Accused 7 filed a suit in the Court of the Sub-Judge, First Class, Delhi, for accounts and injunction. To that suit Accused 8, 9 and 10 were made parties; therein an application was filed for the appointment of a Receiver and a Commissioner to take into custody the accounts and other documents of the Company and for directing them to submit a complete report on the transactions of the Company from 16th October, 1950, upto that date and also for a temporary injunction against the other Directors and the Secretary from interfering in any manner with the work of the Managing Director. In the affidavit filed in support of the petition the various illegal acts committed by the Directors and the Secretary were mentioned. Accused 8 filed an affidavit supporting the alleged fraudulent acts done by the Company. It is not necessary to pursue the internecine conflict between the Directors any further. The documentary evidence is clear that from 29th January, 1951, Accused 7 was taking urgent steps to move the Controller of Insurance and the Court to protect the interests of the Company; while the other Directors were preventing him from pursuing that course. Indeed, they had even removed him from the Managing Directorship. But notwithstanding the said facts, he made some attempts to salvage as far as possible the assets of the Company. It is argued that this conduct on the part of Accused 7 to get the affairs of the Company investigated through police and through Courts is a positive proof that he could not be a guilty party, for, it is said, if he was a conspirator, by this process he would not have focussed the attention of the authorities concerned on his misdeeds. That conduct, the argument proceeds, is inconsistent with human nature. The argument so advanced appears to be plausible, but a deeper scrutiny of the fraud perpetrated on the Company would disclose that Accused 7 is not an innocent party. It may be mentioned that there was a police raid on the office of the Company on 24th January,

1951, and the feverish activity on the part of Accused 7 started thereafter. He says in his written statement filed in the Sessions Court that after the police raid he inquired about the affairs of the Company from two officers, Machilwala and Cardmaster, but they could not give him any idea of the affairs of the Company and that on the next day he had tendered his resignation to the Secretary and he assured him that Shankarlal was not in Bombay and that after he came he would do the needful. It appears that thereafter he consulted Shri Ved Vyas, a Senior Advocate of the Supreme Court, who advised him to take also the help of a competent accountant and after getting the necessary advice of the Advocate and the accountant he had taken steps which we have already narrated. His conduct after the police raid is certainly consistent with his guilt, though it may have the appearance of *bona fide* conduct. Presumably on legal advice he took the necessary steps to exculpate himself from the impending prosecution of the Directors of the Company. His conduct may be explained on three possible hypotheses, namely, (1) he was innocent and the moment the police raid was made he was put on guard, (2) he conspired with the other people from beginning to the end, and after the raid he was trying on legal advice to escape the evil consequences of his acts, and (3) he would have thought that there was nothing wrong for the funds of one company being utilized for the other so long as there was the assurance of Shankarlal that the money so utilized would be recouped and that when he discovered that the fraud went beyond his expectations he woke up to save himself. The first hypothesis would not fit in with the antecedents of the accused and the active part he had taken in purchasing the shares of the Empire and the taking over of the Managing Directorship by him. Whichever hypothesis among the other two was accepted, he would equally be guilty.

To get over this inference an attempt is made to show that he had resigned as early as December, 1950 before the police raid, indicating thereby that the threatened prosecution was not the motive for his *volte face*. Strong reliance is placed upon Exhibit Z-235 and Exhibit Z-235 A. Exhibit Z-235 appears to be the original draft and Exhibit Z-235 A to be a copy of it. Exhibit Z-235 A is the statement sent to the Controller of Insurance through Mr. Sri Prakasa and it is dated 27th August, 1951. Therein he gives the history of his connection with the Company and also the details of the various fraudulent transactions entered into by the Company. He says therein that sometime in August, 1951 having come to know that Shankarlal had not been quite scrupulous in his deals relating to the Insurance Company, he decided to sever his connection with it, and handed over his resignation to Shankarlal, but the latter tore away his resignation letter and assured him that he would so arrange within a month's time that the accused would be relieved from the Managing Directorship. Except for this indirect reference in a letter written subsequently through Mr. Sri Prakasa to the Controller of Insurance there is nothing on the record to show that he wanted to resign before the police raid. This statement presumably written on legal advice appears to make an attempt to date back his intention to sever his connections with the Company sometime before the police raid. Indeed in his resignation letter dated 25th January, 1951, i.e., a day after the police raid, no mention was made of his earlier letter of resignation. The said letter reads:

For reasons personal and other which need not be touched here I find myself quite unable to continue as the Chairman of the Board of Directors of the Managing Director or even as a Director and wish to be relieved of all these responsibilities at the earliest.

If really he gave the resignation letter on an earlier occasion also he would have certainly mentioned the fact that on Shankarlal's personal intervention he continued in the Company so far. Further the Chief of Bagarian transactions give a lie direct to this version. If he came to know of the fraud even in December and submitted his resignation to Shankarlal, how was it that on 30th January, 1951 he had approved the loan to the Chief of Bagarian? On 30th January 1951, a meeting of the Board of Directors of the Empire was held and the minutes thereof were recorded in Exhibit Z-207. Accused 7, 8, 9 and 10 were present at that meeting. The Secretary, placed before the Board for its consideration one proposition for

advance of loan from the Company to His Holiness Bhai Sahib Ardaman Singh, Chief of Bagarian, on the equitable mortgage of his lands, forests and houses. The Board of Directors resolved that an advance of Rs. 77,50,000 be made to the Chief of Bagarian on the equitable mortgage of his property, subject to the title of the borrower to the property being found to be clear and satisfactory by the Solicitors or Counsel appointed by the Company. This resolution was passed, though there was no valuation report and although Accused 7 by that time, according to his case, had come to know of the fraud. The huge loan was granted following the same pattern. This shows that at any rate that till the end of January, 1951, Accused 7 was not serious to get out of the management of the Company. This indicates not only that he could not have resigned earlier, but was deeply involved in the fraud. It is said that the resolution of the Board dated 29th December, 1950, inviting the Maharaja of Dharmajadhra to be the Chairman of the Board of Directors of the Company indicates that Accused 7 had offered his resignation earlier, but on persuasion agreed to continue for some time. But the request to the Maharaja of Dharmajadhra was only to become the Chairman of the Board of Directors and not the Managing Director and therefore this resolution does not throw any light on the factum of Accused 7's resignation of the Managing Directorship in December, 1950.

We, therefore, hold that Accused 7 was a party to the conspiracy and that the High Court has rightly convicted him under section 120-B of the Indian Penal Code. As regards the sentence passed on Accused 7, having regard to the evidence in this case, we think that this accused must be given a comparatively less punishment than his co-conspirators, for though he took part in the conspiracy, at any rate from the end of December, 1950, for one reason or other, he took necessary proceedings to bring to light the fraud. We, therefore, think that it would meet the ends of justice if the accused was sentenced to rigorous imprisonment for a period of two years. We accordingly modify the sentence passed on him by the High Court and, subject to the aforesaid modification, we dismiss the appeal preferred by him.

Next we come to Criminal Appeal No. 136 of 1959 preferred by Subhedar, Accused 8. The defence of this accused is that he acted throughout in good faith and under the guidance of Accused 7, the Managing Director of the Empire, and that he did not know that any fraud was perpetrated in the Empire. Before joining the Empire he was an insurance agent and, therefore, it cannot be said that he was a stranger to the insurance business and he may be assumed to know how it would be conducted. On 16th October, 1950, twenty qualifying shares of the Empire from among the shares purchased in the name of Accused 7 were transferred in his favour and thereafter at the meeting held on that day he was co-opted as a Director. He is also, therefore, one of the persons brought in by Shankarlal and made a Director, for his own purpose.

He was a party to the resolution Exhibit Z-206-F dated 21st October, 1950, wherein Accused 10 was authorised to open accounts in any bank and to operate the same singly. He was also a party to the resolutions passed on 27th November, 1950 and 18th December, 1950, granting 12 loans of large amounts without any real scrutiny. He was also a party sanctioning a huge loan to the Chief of Bagarian. He was further a party to the resolution sanctioning the sale of the Empire securities of the value of Rs. 90,60,000 and opening of marginal accounts in the Punjab National Bank, Ltd. It is idle to suggest that a Director who was inducted into the Company in the manner in which he was done and who had knowledge of insurance business would have *bona fide* signed the resolutions dealing with large amounts and with huge securities without deeper scrutiny. A reasonable inference is that he was in the conspiracy and was acting in the manner he did only for the purpose of implementing the object of the conspiracy. His conduct after he fell out with Accused 7 is telltale. On 17th February, 1951, even after the police raid Accused 8 transferred telegraphically a sum of Rs. 9,00,000 from the account of the Empire with the Imperial Bank to the account with the Punjab National Bank, Civil Lines Branch,

Delhi On 19th February, 1951, he wrote another letter Exhibit Z-466-A to the Imperial Bank, Bombay, that notwithstanding the previous letter dated 17th February, 1951, the transfer was not effected and that they must do so immediately On 17th May, 1951, in the suit filed by Accused 7 on behalf of the Empire, he filed an affidavit Exhibit Z-634, wherein he asserted that the loan to the Chief of Bagarian was a genuine one and that it was an advance to a substantial party on good security He did not even co-operate with Accused 7 in preventing further fraud In spite of the police raid he was a party to all the resolutions passed subsequently putting obstacles in the way of Accused 7 and finally terminating the appointment of Accused 7 and withdrawing all instructions given in regard to the operation of the Bank account (see Exhibit Z-210-A dated 3rd March, 1951, Exhibit Z-210 B dated 12th March, 1951 and Z-210-C dated 27th March, 1951) His services to Shankarlal were recognized and under the latter's will, Exhibit 186, he was given a legacy of Rs 6 000 We have no doubt that the aforesaid circumstances lead to only one reasonable conclusion that this accused became a Director of the Empire as a member of the conspiracy and helped to put through all the transactions necessary to transfer funds from one Company to the other He was rightly convicted by the High Court We do not see any reason to interfere with the sentence passed against him In the result Criminal Appeal No 136 of 1959 is dismissed

Criminal Appeal No 172 of 1959 is preferred by Sayana, Accused 9 He was a building contractor before he was appointed a Director of the Empire His defence is also that he *bona fide* acted without knowledge of the conspiracy or the fraud He was also one of the Directors inducted into the Company by the transfer of qualifying shares from and out of the shares purchased in the name of Accused 7 He was co-opted as a Director on 17th October, 1950, under Exhibit Z 206-C Though he was not present at the meeting of 27th November, 1950, he was present at the meeting of 18th December, 1950, and, therefore, with the knowledge that six loans amounting to Rs 28,80,000 were advanced without scrutiny of the securities, he was a party in sanctioning another six loans totalling to Rs 42,80,000 He was also a party to the resolution of 30th January, 1951, sanctioning a bogus loan to the Chief of Bagarian He was a party to the resolution dated 9th February, 1951, when the said loan was confirmed and to the resolution authorizing Accused 9 to operate singly the accounts of the Company Exhibit Z-210 A shows that at the meeting of March, 1951 he was elected Chairman and he objected to the presence of Mr Martin who came to the meeting at the instance of Accused 7 He was also a party to the resolution terminating the services of Accused 7 Under the authority conferred by the relevant resolutions he had taken proceedings against the Controller of Insurance in the High Court of Punjab at Simla Exhibit Z-210-C dated 27th March, 1951, shows that he was the Chairman at the meeting and that a resolution was passed therein rescinding all previous instructions given in regard to the operation of the Bank accounts and also cancelling the order of suspension passed against the Secretary It is, therefore, clear that he was a creature of Shankarlal, that he was a party to the diversion of the funds of the Empire to the Jupiter and that when Accused 7, for his own reasons, was taking steps to stop the rot, he, along with Accused 8, obstructed him from doing so and wholly supported Accused 10 The only reasonable hypothesis on the evidence is that he was a party to the conspiracy It is said by learned Counsel appearing for this accused that his subsequent conduct would not indicate any obstructive attitude on his part but would indicate only his desire to maintain the *status quo* till the matters improved This is a lame explanation, for he along with the other Directors, opposed every attempt of the scrutiny of the Company's affairs and this can only be because they were conscious of their part in the fraud

In this context another argument of learned Counsel for Accused 8 and 9 may be noticed It is said that the High Court treated the Directors as trustees and proceeded to approach the case from that standpoint inferring criminality from their inaction Even assuming that they were not trustees in the technical sense of the term, they certainly stood in a fiduciary relationship with the shareholders The

High Court's finding is not based upon any technical relationship between the parties, but on the facts found. On the facts, including those relating to the conduct of the accused, the High Court drew a reasonable inference of guilt of the accused. There is sufficient evidence on which the High Court could have reasonably convicted Accused 8 and 9 and in the circumstances, we do not see any case had been made out in an appeal under Article 136 of the Constitution to merit out interference.

In the result Criminal Appeal No. 172 of 1959 is dismissed.

Finally we come to Criminal Appeal No. 67 of 1959 preferred by Bhagwan Swarup, Accused 10. The defence of this accused is that he acted throughout on the directions of Accused 7, 8 and 9, and that, as Secretary of the Company, he was bound to follow their directions. This accused is the nephew of Shankarlal. He is an M.A., LL.B. He held the office of Assistant Commissioner of Income-tax in Patiala State. He is the person who carried out the resolutions of the Board of Directors of the Empire through intricate channels to enable the large amounts misappropriated to reach the Jupiter Company. It is suggested that he was not well disposed of towards Shankarlal and therefore he could not have any knowledge of Shankarlal's fraudulent motives behind the purchase of the controlling shares of the Empire. If Shankarlal did not like him he would not have put him in the key position in the Empire. Indeed, the will of Shankarlal shows that this accused got the best legacy under it. He was the connecting thread passing through the web of conspiracy from beginning to end. Naurangrai, as P.W. 22, says that on 14th or 15th October, 1950 he met Shankarlal at Dhanraj Mahal in Bombay. There it was arranged that Accused 1, 7 and 10 should go to Ramratan's house the next day. The three of them went to Ramratan's place and Damodar Swarup issued the six cheques in Ramratan's house as part payment of the purchase price of the controlling shares of the Empire. This shows that Bhagwan Swarup was with them from the beginning. On 17th October, 1950 at the Directors' meeting a resolution was passed appointing him as the Secretary of the Empire on a salary of Rs. 1,350 per month. Exhibit Z-206-F is the minutes of the Board of Directors held on 21st October, 1950, wherein a resolution was passed authorizing Accused 10 to open accounts in any bank or banks and to operate on such bank accounts as may be deemed necessary for the business of the Company; and some other powers were also conferred on him. Bhagwan Swarup was, therefore, appointed as the highest executive officer in the Company and he was in charge of the relevant transactions. He was the man who negotiated for the purchase of the securities worth Rs. 20,00,000 from Kohli, the broker. P.W. 97 is Kohli. He spoke to the correspondence between him and Accused 10. The letters written to Kohli were signed by Accused 10. His evidence shows that though he acted as a broker for the purchase of the securities from the Jupiter, he did not receive the price of the said securities *viz.*, Rs. 20,00,000 from the Empire, but the Jupiter told him that they had received the amount directly. Exhibit Z-218 is the letter dated 18th October, 1950, written by Accused 10 to Messrs. Vilaytilal Kohli & Co. asking them to arrange for the purchase, on behalf of the Empire of Victory Loan and Government Loans of certain specifications. In Exhibit Z-218-A, Kohli, on behalf of Kohli & Co., informed the Accused 10 that he would purchase the required securities, but suggested that the payment of Rs. 20,00,000 might be made in advance. Exhibit Z-218 dated 26th October, 1950, was the reply by Accused 10 to the letter of Kohli wherein he communicated the approval of the suggestion by the Managing Director and also told him that the securities purchased might be delivered to their bankers, the Punjab National Bank, Ltd. On basis of the said correspondence Accused 10 drew one self-bearer cheque, Exhibit Z-216, for Rs. 15,00,000. Sanghi in his evidence as P.W. 84 says that at the directions of Shankarlal he followed Bhagwan Swarup to the State Bank and filled in "the paying-in-slip" Exhibit Z-347-A, signed it and also the counterfoil as Sanghi for depositing the said amount of Rs. 14,00,000 in the Bank. He did not actually deposit the amount and he also did not see who deposited it, but Shankarlal told him that he gave Rs. 14,00,000 to Accused 10 and Accused 10 was with him in the Bank throughout the conversation he had with the Manager of the Bank and during the time he was preparing the "paying-in-slip". It is, there-

fore, obvious that it is Bhagwan Swarup that deposited the amount in the Bank by using the name of Sanghi. Sanghi is definite in his evidence that he had nothing to do with the Tropical shares and the money deposited by him was shown in the Jupiter accounts as though the said amount was the repayment of the price of the Tropical shares worth Rs 54 00,000 purchased by the Jupiter, which was objected to by the Auditors. On 27th October, 1950, another self bearer cheque for Rs 5 00 000 was drawn by Accused 10 on behalf of the Empire. This amount went into the Bank account of Jupiter as though Raghavji has repaid his loan in cash. The securities for the purchase whereof the Empire is alleged to have paid Rs 20 00 000 were given delivery only subsequently. This transfer of money by this process became necessary to meet the objections raised by the Auditors, and to satisfy them before the year was out. Accused 10 contends that he withdrew the money from the bank and deposited it with the Cashier of the Empire. But he neither took a receipt for deposit of the said amount nor the account books of the Empire show any entries to that effect. Machhliwala, the Zonal Accountant of the Empire, as P W 105 says that in spite of the said two cheques, the money never came back to the Empire. It is therefore clear from the aforesaid transactions that Accused 10 used his office and brought about this transaction to enable Shankarlal and the Directors of the Jupiter to tide over their difficulties with the Auditors. This transaction in itself is sufficient to dub Accused 10 as one of the conspirators. No Secretary of a big company like the Empire would have dared to be a party for transferring the funds of the Empire to Jupiter unless he was in the conspiracy.

Accused 10's complicity in getting the sanction of the Board of Directors on 27th November, 1950, and 18th December, 1950 for 12 fictitious loans is also apparent from the evidence in the case. Assuming that at the time when the applications were placed before the Board of Directors Accused 10 had no knowledge of their fictitious character, as an executive officer he was bound under the terms of the resolutions to see before the moneys were paid that the title of the properties was scrutinized and approved by the Solicitors of the Company. Machhliwala, the Accountant (P W 105), deposes that at the end of November, or the beginning of December, 1950 he met Mr. Martin, the Solicitor and a partner of Little & Co., Bombay, twice, once alone and again with Accused 10. When he went alone he took with him some papers given by Accused 10 to enquire what requirements had to be fulfilled before granting the loans by the Company. The documents given to him by Accused 10 were those relating to some properties in Delhi. The said documents did not bear the seal of any authority, and they were only copies. After he returned from Mr. Martin he met Accused 10 and told him that the documents were not certified copies and that the parties should execute promissory notes and declare that the said properties had not been alienated to anyone else. 5 or 6 days later, both the witness and Accused 10 went to Mr. Martin and the documents produced by Accused 10 had seals purported to be of the Delhi Land Development Board. After Mr. Martin looked into the documents, to a remark made by him, Accused 10 told him that it was difficult to make advertisements in Bombay, Lahore and Delhi and he also told him that the originals were lost during the partition of India. 10 advertisements were made and that he was not consulted thereafter. On his return, Accused 10 called him and handed over to him the cheque book pertaining to the account opened in the Civil Lines Branch of the Punjab National Bank, Delhi, and told him that the loans had been sanctioned and that the payment of the amounts of loans to the different persons were made by cheques at Delhi and that he should prepare the necessary vouchers and post the necessary entries in the books of the Company. This evidence was accepted by the two Courts below. The manner in which the title of the properties of the loanees was scrutinized indicates that Accused 10 was pursuing a pre arranged plan.

On 14th December, 1950, Accused 10 wrote a letter, Exhibit Z-382, to the Manager of the Punjab National Bank, Ltd., Bombay, asking him to open a current account in the name of the Empire at their branch office in Civil Lines, Delhi.

In that letter he informed the Bank that as Secretary of the Empire he was authorised to operate singly on any account maintained by the Company at any time at any place with any bank. He forwarded his signature and promised to send the signature of the Managing Director later on. In the meantime he asked the Manager to open the account and transfer a sum of Rs. 30,00,000 to the Civil Lines Branch, Delhi. It may be remembered that this letter was written after the resolution of 27th November, 1950, sanctioning six loans and three days before the sanctioning of the rest of the six loans. Exhibit Z-383, an extract of the account of the Punjab National Bank, shows that the said amount was transferred to the Delhi Civil Lines Branch on the same day. On 15th December, 1950 *i.e.*, when the second batch of loans were sanctioned, Accused 10 wrote a letter to the Manager of the Punjab National Bank, Ltd., Bombay, requesting him to transfer a further sum of Rs. 30,00,000 to the Civil Lines Branch, Delhi, and requesting him to make sure that the amount was credited to the account of the Empire in the Delhi Branch. It would be seen from this letter that the Secretary was anxious that the money should reach Delhi, for he knew that on 18th December, 1950, the next batch of six loans would be sanctioned by the Board of Directors. Exhibit Z-230 is the 12 self-bearer cheques drawn by Accused 10 between 19th and 23rd December, 1950. As we have already mentioned, by various manipulations these cheques were used for drawing out moneys from the Punjab National Bank and for taking out 5 drafts for various amounts in favour of Kaul, Guha and Ramasharan and Mehta of the Jupiter and the moneys reached the Jupiter. It is not disputed that Accused 10 was in Delhi on the dates the cheques bear. Accused 10 says that on 18th December, 1950, before he left Bombay for Delhi he wrote the cheques at the dictation of Accused 7. Even on that assumption he cannot escape his complicity in the offence. Accused 10 being the Secretary could not have believed that the investigation and scrutiny of the title of the loanes to the properties were completed so soon after the sanction of the loans. The expedition with which the applications for loans were sanctioned, the cheques were issued, the moneys were drawn and the destination they reached, clearly indicate that the Chief Executive Officer of the Empire was a party to it. Again this accused was present at the time the Board of Directors granted a loan of Rs. 77,50,000 to the Chief of Bagarian. On 24th January, 1951, there was a police raid on the office of the Empire and Accused 10, being its Chief Executive Officer, knew that the police raid was in connection with the loans. But on that day a loan was sanctioned for Rs. 77,50,000. He knew that the previous loanes did not repay the amount. If he was not in league with the conspirators, was it not his duty to place before the Board of Directors the obvious fact that there was no fund out of which this huge loan could be sanctioned? That apart, would he allow, if he was really innocent and after what all happened, the transaction to which all the infirmities of the earlier loans were attached to be put through. In the circumstances, it must be a legitimate inference that he knew that the said transaction was really conceived to cover up the earlier fraud. In the context Exhibit Z-233 throws much light on his *bond fides*. This contains a statement of the details of the 12 loans alleged to have been repaid by the loanes. On this Accused 10 made the endorsement directing the Accountant, "to take the entries into the books". The Accountant as P.W. 105 says in his evidence that that statement with the aforesaid directions was handed over to him by Accused 10 for making the relevant entries. This circumstance shows that Accused 10 wanted the said entries to be made for the purpose of supporting the new transaction, *i.e.*, the loan to the Chief of Bagarian. Learned Counsel appearing for this accused could only argue that the accused was a subordinate of the Directors and that he had followed only loyally the directions given by the Managing Director without any knowledge of the conspiracy. This argument is an over-simplification of the part taken by Accused 10 in this huge fraud. Both the Courts below have held, on the aforesaid circumstances and other evidence, that Accused 10 was an active participant in the conspiracy. In our view, there is ample material to justify it. In the result Criminal Appeal No. 67 of 1959 is dismissed.

V. S.

Appeals dismissed.

THE SUPREME COURT OF INDIA
(Civil Appellate Jurisdiction)

PRESENT —A K SARKAR, M HIDAYATULLAH, AND J R MUDHOLKAR, JJ
State of Punjab . . . Appellant*

v
Messrs Modern Cultivators . . . Respondent

Tort—Flooding of lands as result of breach in canal belonging to State—Failure of State to produce documents which would have shown how breach occurred—Effect—Liability of State for damages—Res ipsa loquitur—Applicability—Limitation Act (IX of 1908), Article 2—If applicable to suit for damages for loss caused by flooding

In a suit for damages for loss caused to the plaintiff's crops by reason of flooding the plaintiff's land as a result of a breach in a canal belonging to the defendant, the State of Punjab held

Per Sarkar, J As the defendant State failed to produce relevant documents in its possession which would have shown how the breach occurred negligence can be rightly inferred against the defendant. Furthermore the rule of *res ipsa loquitur* applies to the case. The canal was admittedly in the management of the defendant and canal banks are not breached if those in management take proper care. In such cases the rule would apply and the breach itself would be *prima facie* proof of negligence. The defendant is liable for damages.

Article 2 of the Limitation Act does not apply to the suit as it cannot be said to be a suit for doing or omitting to do an act alleged to be in pursuance of any enactment. The Northern India Canal and Drainage Act of 1873 did not impose any duty on the defendant to take care of the banks of canals. The suit was accordingly in time.

Per Hidayatullah, J The doctrine of *res ipsa loquitur* should not be applied as legal rule but only as an aid to an inference when it is reasonable to think that there are no further facts to consider. It was not an inevitable accident and the Government must be held liable. The break in the canal cannot claim to be in pursuance of the Canal Act. Article 2 of the Limitation Act does not apply to the case.

Per Mudholkar, J If there is material from which it could be inferred that the breach was caused by reason of negligence on the part of the State in inspecting the banks of the canal and in particular that portion of it where the breach had been caused the State would be liable in damages. This would be so not by the operation of the rule in *Rylands v Fletcher*, (1868) L.R. 3 H.L. 330 but by reason of negligence. The sole ground upon which the liability of the State could be established in this case would be negligence of the State in properly maintaining the banks of the canal.

Appeals from the Judgment and Decree dated 1st May, 1956, of the Punjab High Court in Regular First Appeal No. 45 of 1950.

A V Vishwanatha Sastri, Senior Advocate, (Gopal Singh and R N Sachthy, Advocates, with him), for Appellant (In C.A. No. 416 of 1962) and Respondent (In C.A. No. 417 of 1962)

S T Desai, Senior Advocate, (Hardajal Hardy and J P. Aggarwal, Advocates, with him), for Respondents (In C.A. No. 416 of 1962) and Appellants (In C.A. No. 417 of 1962)

The Court delivered the following judgments .

Sarkar, J—I agree with the orders proposed by my brother Hidayatullah.

These appeals arise out of a suit brought by a firm called the Modern Cultivators against the State of Punjab to recover damages for loss suffered by flooding of its lands as a result of a breach in a canal belonging to the State of Punjab. Both the Courts below have held in favour of the plaintiff but the High Court reduced the amount of the damages awarded by the trial Court. Both parties have appealed to this Court. The Modern Cultivators contend that the High Court is in error in reducing the amount of the damages. The State of Punjab contends that it had no liability for the loss caused by the flooding. The breach and the flooding of the plaintiff's lands are not now denied.

In regard to the appeal by the Modern Cultivators I have nothing to add to what has been said by Hidayatullah, J. For the reasons mentioned by him I agree that the damages had been correctly assessed by the trial Court.

In its appeal the State of Punjab first contended that the plaintiff could not succeed as it had failed to prove that the breach had been caused by the defendant's negligence. I am unable to accept this contention. The trial Court inferred negligence against the defendant as it had failed to produce the relevant documents and with this view I agree. The defendant had produced no documents to show how the breach was caused. It had been asked by the trial Court to do so by an order made on 12th May, 1949, but failed to produce them. The defendant had a large number of Canal Officers and according to Mr. Malhotra, the Executive Engineer in charge of the canal at the relevant time, there was a regular office and various reports concerning the breach had been made. None of these was produced at the hearing. It is obvious that in an organisation like the Canal Office, reports and other documents must have been kept to show how the breach occurred and what was done to stop it. If such documents are not produced, an inference can be legitimately made that if produced, they would have gone against the case of the defendant that is, they would have proved that the defendant had been negligent: *Cf. Murugesam Pillai v. Manickavasaka Pandara*¹. It was suggested in this Court that the documents had been destroyed. It may be that they are now destroyed. One of the defendant's Officers called by the High Court in view of the unsatisfactory nature of the documentary evidence said that documents were destroyed after three to seven years. The breach occurred in August, 1947, the suit was filed in October, 1948 and the trial was held about August 1949. So it would appear that at the time of the trial the relevant documents had not been destroyed. Nor was it said that they had then been destroyed. Furthermore, in view of the pendency of the suit the documents must have been preserved. It is clear that they had not been produced deliberately. An inference that the defendant was negligent in the management of the canal arises from the non-production of the documents. There is, therefore, evidence that the defendant was negligent.

Furthermore it seems to me that the rule of *res ipsa loquitur* applies to this case. The canal was admittedly in the management of the defendant and canal banks are not breached if those in management take proper care. In such cases the rule would apply and the breach itself would be *prima facie* proof of negligence: see *Scott v. London Dock Co.*². No doubt the defendant can show that the breach was due to act of God or to act of a third party or any other thing which would show that it had not been negligent, but it did not do so. It may be that the rule of *res ipsa loquitur* may not apply where it is known how the thing which caused the damage happened as was held in *Barkway v. South Wales Transport Co., Ltd.*³. But that is not the case here. No reason has been advanced why the rule should not apply. Therefore I think that the first contention of the defendant that there is no evidence of negligence must be rejected.

I do not think it necessary in the present case to consider whether the rule in *Rylands v. Fletcher*⁴, applies to make the defendant liable for I have already held that it is liable as negligence has been proved.

The second point raised by the defendant was one of limitation. It was contended on behalf of the defendant that the case was governed by Article 2 of the First Schedule of the Limitation Act. It is not in dispute that if that article applied, the suits would be out of time. That article relates to a suit "for compensation for doing or omitting to do an act alleged to be in pursuance of any enactment." It was said that the Northern India Canal and Drainage Act, 1873 imposed a duty on the defendant to take care of the canal banks and its failure to do so was the omission to do an act in pursuance of an enactment within the article. I have very grave doubt if this interpretation of Article 2 is correct. There is authority against it: see *Mohammad Sadat Ali Khan v. The Administrator, Corporation of City of*

1. L.R. 44 I.A. 98 : I.L.R. 40 Mad. 402 :
32 M.L.J. 369.

2. 3 H. & C. 601.

3. (1950) 1 All E.R. 392.

4. (1868) L.R. 3 H.L. 330.

*Lahore*¹ But apart from that I find nothing in the Canal Act imposing any duty on the defendant to take care of the banks. We were referred to sections 6 and 15 of that Act. Both are enabling sections giving power to the State Government to do certain acts. Under section 6 it has power to enter on any land and remove any obstruction and close any channels or do any other thing necessary for the application or use of the water to be taken into the canal. This obviously does not impose any duty in connection with the canal bank. Section 15 gives the power to the Canal Authorities in case of accident happening or being apprehended to a canal to enter upon lands of others and to do all things necessary to repair the accident or prevent it. This section again has nothing to do with taking care of the canal banks. Therefore, even assuming that the defendant's interpretation of Article 2 is correct, this is not a case to which it may apply. I wish however to make it clear that nothing that I have said here is to be read as in any way approving the defendant's interpretation of Article 2. Therefore the defendant's contention that the suit was barred by limitation also fails.

The defendant's appeal must, therefore, be dismissed and the plaintiff's appeal allowed. Costs will naturally follow the result.

Hidayatullah, J—On 15th August, 1947, the Western Jamna Canal at R D No 138000 near Sangipur and Jandhrea villages burst its western bank. The canal water inundated the neighbouring fields where crops of sugarcane, maize, urud, etc., grown by the plaintiff firm were damaged. The plaintiff brought this action alleging that the breach in the bank was caused by negligence on the part of the Canal Authorities who were guilty of further negligence in not closing the breach without delay. The plaintiff estimated its loss at Rs 60,000 in respect of the standing crop and a further loss of Rs 10,000 in respect of the deterioration of the land for future cultivation. It however, limited its claim to Rs 20,000.

The State Government denied negligence on the part of the Canal Authorities. Government admitted that a breach did occur in an old inlet channel of Chhalaundi Silting Tank on 15th August, 1947, and some canal water escaped through the breach which, it was said, flowed back to the canal through the outlet of the silting tank lower down the canal. Government claimed that the site was immediately inspected by the Executive Engineer and no damage to the crops was discovered and that the breach was promptly closed and the bank was strengthened. Government stated that there were heavy rains on the 8th September and again from 23rd to 28th September, 1947, causing floods in the *nallahs* but as the canal was running full supply, water brought by the *nallahs* to the silting tank could not get to the canal and over flowed to the adjoining areas. Shortly stated, plaintiff's case was that there was a breach in the western bank of the canal owing to the negligence of the defendants and canal water escaped to the fields causing them to be flooded, while the case of the Government was that a breach did take place but it was promptly repaired and the fields were flooded not by the canal water but by heavy rains in the month of September. The trial Judge passed a decree for Rs 20,000 against Government but it was reduced by the High Court to Rs 14,130. These two cross appeals have thus been filed by the rival parties by Special Leave of this Court.

The High Court and the Court below have agreed in holding that there was a break in the canal. The size of the breach has been variously described, but it was certainly not less than 30 feet wide and the depth of the water at the breach was about 15 feet. It is admitted that the canal was then running full supply @ 5,000 Cusecs. As the width of the canal was 400 feet, the out flow would be at the rate of $5,000 \times 30/400$ Cusecs if the breach was 30 feet wide. This would mean extensive flooding of the low lying areas unless the breach was immediately closed. Some of the witnesses say that it was as much as 70 to 80 feet wide and that would make

the out-flow even greater. The High Court held that the floods were not caused by the rains. Prior to the break in the canal there was only 1" of rain fall. The heavy rains took place much later. The inundation of the fields was thus by water from the canal and not from the *nallahs*. This much has already been held. It is admitted that the breach occurred at a place where there was an old *nallaha* through which silting operations were carried out in the past and this exit was closed in the previous years and the breach was at that very site. The breach was noticed on the morning of the 16th. No attempt was made by either side to establish the exact duration of time before the breach was repaired. Mr. Malhotra (Executive Engineer) stated that it was repaired by the 18th but was re-opened (one does not know why) on the 20th and again closed on the 21st. Evidence on behalf of the plaintiff established that water continued pouring out as late as the month of October. This was apparently an exaggeration. There is no evidence to show that the flow of water in the canal was reduced from the head works when the breach occurred. It apparently continued on full supply. The High Court attempted to secure the documents from the Canal Office which had not been produced earlier. The Executive Engineer, then in charge was summoned to bring all the papers in his Office and he produced the telegrams received by and copies of telegrams issued from the Head Office between 16th August, 1947 and 5th September, 1947. From these documents it is now established that the breach was not repaired at least upto 27th August, 1947, and the evidence that it was repaired on the 18th was therefore not accurate. It has also been established that the case of the plaintiff that water continued to flow right upto October was also false. It may thus be assumed that repairs were completed by the 27th August but not earlier.

It is admitted that the area into which water flowed was used as a silting tank ; the silting operations comprise the opening of the bank of the canal at a selected place to let out turbid water which passing through the silting tank drops the sediment and flows back to the canal at a lower reach free of the silt, and closing of the bank. It is now admitted that at the exact spot where the breach took place there was previously an opening for silting purposes which was recently closed. There is no evidence to show negligence on the part of Government. Curiously enough Government said that it had not preserved the papers connected with this mishap. We can hardly believe this. Government led evidence to establish that the banks of the canal were periodically inspected and claimed that the breach was an act of God without any negligence on the part of the Canal Authorities. It is an admitted fact that crops of the plaintiff were destroyed if not wholly at least substantially. The only question, therefore, is whether Government can be held responsible for the damage caused to the plaintiff and, if so, what should be the compensation.

Two points were urged on behalf of Government : the first was that the suit filed by the plaintiff was out of time inasmuch as Article 2 of the Indian Limitation Act which prescribes a period of three months was applicable and not Article 36 which prescribes a period of two years. This was held against Government by the High Court and the Court below. The second point urged on behalf of Government was that there was no proof of negligence whatever by the plaintiff and the plaintiff must therefore fail. The High Court in dealing with this point held that, in the circumstances *res ipsa loquitur* and that it was not necessary for the plaintiff to prove negligence and it must be so presumed. The High Court differed from the Court below in assessing damages.

In the appeal of the Government both these points are urged. On behalf of the plaintiff, in the companion appeal, it is contended that the High Court omitted to give proper compensation for the loss of maize and *urud* crop. It is submitted that the High Court adopted the formula that in respect of sugarcane crop which needs plenty of water the damages should be assessed at $\frac{1}{3}$ of the value of the crop and in respect of maize and *urud* crops at $\frac{1}{2}$ the value. The plaintiff contends in its appeal that the whole of the maize and *urud* crop was completely destroyed and

the decree of the Court of first instance allowing $\frac{3}{4}$ of the value of the crop as compensation was unassailable. It is pointed out that evidence disclosed that water in the fields was 4 to 5 feet deep and the maize and *urud* plants were less than 2 feet high. In other words, the plants remained submerged during all the times the fields were inundated. It is obvious that the crop must have been entirely destroyed and the allowance of $\frac{1}{4}$ was because the destroyed crop had some value as *charr*. On the facts, as found, there was hardly any justification for reducing the amount of the decree for damages passed by the Court of first instance. The High Court itself, in more than one place, stated in its judgment that the maize and *urud* crops were completely destroyed. It is, therefore, clear that unless Government succeeds in its appeal the decree of the Court of first instance must be restored in this case. Mr Vishwanatha Sastri on behalf of Government asked for a remit, but in view of the slight difference and the fact that the High Court itself remarked that the maize and *urud* crops were completely destroyed there would not be any necessity to order a remit in case the appeal of the Government fails. I shall now turn to that appeal.

The facts as found in this case are that in 1946, the land which got flooded, was used for silting operations. An opening in the western bank was made in that year and the bank was restored in June, 1946. Till the month of August in the following year there was no complaint. Evidence discloses that the bank was regularly inspected. A Special Engineer and a Special Sub Divisional Officer were in charge and there were watchmen also. There is no evidence of wilful conduct. The plaintiff has not led evidence to establish any particular act of negligence. There is no evidence that the breach was caused by the act of a third party or even of God. Mr Sastri, therefore, contends that as there was no foreseeable danger against which precautions could be taken beyond making periodical inspections, and this was done, there can be no liability. He submits that in this view of the matter the plaintiff must fail in the absence of proof of negligence.

The High Court applied to the case the rule in *Donoghue v Stevenson*¹, reinforcing it with what is often described as the doctrine of *res ipsa loquitur*. This case is first of its kind in India and needs to be carefully considered. Before us reliance was placed upon the rule in *Rylands v Fletcher*². That rule, shortly stated, is, that any occupier of land who brings or keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence. *Per Salmond Law of Torts*, 13th Edition, page 574. The rule in *Rylands v Fletcher*² was derivatively created from the rule of strict liability applicable to the acts of animals but, in my opinion, it is hardly applicable here. Canal systems are essential to the life of the nation and land that is used as canals, is subjected to an ordinary use and not to an unnatural use on which the rule in *Rylands v Fletcher*² rests. The words of Lord Cairns "non natural use" of land and of Blackburn, J. "Special use bringing with it increased danger to others" are sometimes missed. There is difficulty in distinguishing non natural and natural user but perhaps the best test to apply is stated by Lord Moulton in *Richards v Lothian*³.

¹ Some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

They formed the basis of observations of Viscount Maugham in *Sedleigh Denfield v V O Chirlagham and others*⁴. As was pointed out by Holmes in his *Common Law* (1963) at page 93.

"It may even be very much for the public good that dangerous accumulations should be made."

Cases of breaks in canals resulting in danger to neighbouring lands are rare but some are to be found in Law Reports from the United States of America.

1 L.R. (1932) A.C. 562
2 [1868] L.R. 3 H.L. 300

3 L.R. (1913) A.C. 263, 280
4 L.R. (1940) A.C. 880 at 888

I need not refer to them because the following passage from American Jurisprudence, Volume 9, page 340, para. 38 gives an adequate summary of the principles on which they had been dealt with :

"A canal company is also liable for flooding private property where it has not acquired the legal right to do so ; it is answerable in damages for all loss occasioned by a neglect on its part to use reasonable care and precaution to prevent the waters of its canal from escaping therefrom to the injury and detriment of others. A canal proprietor is not, however, liable for damages to adjoining lands resulting from a mere accidental break in his canal which human foresight and vigilance could not have anticipated, and against which proper prudence and judgment could not be expected to provide. Although it has been held that a canal company is not liable for damages occasioned by the percolation of waters through the banks of its canal, in the absence of proof of negligence on its part in want of skill or care in the construction and maintenance of its canal, such holdings are opposed to the weight of reason and authority."

Perhaps the liability is viewed strictly as an inducement to care. Safety is best secured when it is made the responsibility of the person who must not only take precautions to avoid accident but who alone decides what those precautions should be. In this connection the rule that is most often quoted was stated by Erle C.J., in *Scott v. London and St. Katharins Docks Co.*¹ thus :

"There must be reasonable evidence of negligence.

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In subsequent cases it has been customary to regard this as a statement of the principle of *res ipsa loquitur*. But the principle, if it be one, cannot always be safely applied where the facts before the Court are not the whole facts. In a vast canal system constructed with great care and attention to detail it may be difficult to prove negligence but it may sometime be equally difficult to explain how the defect arose. The principle of *res ipsa loquitur* had its origin in the falling of a barrel of flour from a first floor window on a passerby but it has been extended to situations quite different. It is not very much in favour and if applied it must be correctly understood. It is not a principle which dispenses with proof of negligence. Rather it shifts onus from one party to another. It is a rule of evidence and not of liability. A too ready reliance on the maxim reinforces a fault liability and makes it into an absolute liability. If absolute liability is to give way to fault liability, some fault must be established by evidence or must be capable of being reasonably inferred from the circumstances. It is not sufficient to say *res ipsa loquitur* because the danger is that facts may not always tell the whole story and if there is something withheld how can the thing be said to speak for itself? The principle which I consider reasonable to apply where fault has to be inferred from circumstances was best stated by Lord Porter in *Barkway v. South Wales Transport Co., Ltd.*² :

"The doctrine is independent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

I have made these observations so that the principle may not be applied too liberally. It must also be remembered that what is said in relation to it in one case cannot indiscriminately be applied to another case. It should not be applied as legal rule but only as an aid to an inference when it is reasonably to think that there are no further facts to consider.

I shall now consider the facts as they stand in this case to discover if the Canal Authorities can be said to be at fault. The facts show that the water escaped in the Chillaundi Silting Tank through the *nallaha* which had previously been used

1. 3 H.V.C. 596 : 159 E.R. 665.

2. (1950) 1 All E.R. 39 H.L. at 394, 395.

for silting operations and had been sealed in the previous year. If the plug were sound it would have withstood the pressure of water as it did after it was repaired on the 27th August even though 28" of rainfall fell within 20 days. There is nothing to show that the outflow was due to rainfall or a storm so exceptional that it could be regarded as an act of God. Nor was it due to any disturbance of earth's crust or interference by a stranger. There is thus sufficient evidence, in the absence of reasonable explanation (which there is not), to establish negligence. Further, there was inordinate delay and negligence in sealing the breach. Even the flow in the canal was not reduced for repairs to be carried out quickly. In such circumstances, the facts prove negligence and Government was rightly held responsible. Whether the defect was patent or latent is not much to the purpose. It was not an inevitable accident, and the Government must be held liable.

It remains to consider the question of limitation. The High Court and the Courts below have applied Article 36 of the Indian Limitation Act. Government claims that the proper Article to apply was Article 2. These Articles may be set down here :

| Description of suit | Period of Limitation | Time from which period begins to run |
|--|--------------------------|--|
| 2 For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in India | Ninety days | When the act or omission takes place |
| 36. For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for. | Two years (now one year) | When the malfeasance, misfeasance or non-feasance takes place. |

It is not denied that if Article 2 was not applicable, the proper Article would be Article 36 and the suit would also be within time. In contending that the second article applies reliance is placed on a decision of the Privy Council in *Punjab Cotton Press Co., Ltd. v. Secretary of State*¹. But that case is clearly inapplicable. There the Canal Authorities cut the bank of a canal at a selected point to let the water away with a view to protecting a railway track passing close by on a high embankment and in this way flooded and injured the plaintiff's mills. The Judicial Committee held that if the act was done, as was said, under section 15 of the Northern India Canal and Drainage Act, 1873 (VIII of 1873), Article 2 was applicable and not Article 36. The case was thus remanded to find the facts necessary for the application of the right article. In relying upon this case, Mr. Vishvanatha Sastri claims that section 15 of the Canal Act covers the present facts. Mr. Gopal Singh, who followed, also refers to section 6. These sections read :

"6 Powers of Canal Officer—At any time after the day so named, any Canal Officer, acting under the orders of the State Government in this behalf, may enter on any land and remove any obstructions, and may close any channels, and do any other thing necessary for such application or use of the said water."

"15 Power to enter for repairs and to prevent accidents—In case of any accident happening or being apprehended to a canal, any Divisional Canal Officer or any person acting under his general or special orders in this behalf may enter upon any lands adjacent to such canal, and may execute all works which may be necessary for the purpose of repairing or preventing such accidents

Compensation for damage to land—In every such case, such Canal Officer or person shall tender compensation to the proprietors or occupiers of the said lands for all damage done to the same. If such tender is not accepted, the Canal Officer shall refer the matter to the Collector, who shall proceed to award compensation for the damage as though the State Government had directed the occupation of the lands under section 43 of the Land Acquisition Act, 1870 "

In regard to section 6 it is sufficient to say that it has no application here. It refers to the day named in section 5 and that section provides for a notification

to be issued declaring that water would be applied after a particular date for purpose of any existing or projected canal or drainage work or for purposes of Government. On such notification issuing any Canal Officer, acting under the orders of the State Government, may enter on any land and remove obstructions or close any channels so that water may be applied to those purposes. This is an entirely different matter and it is no wonder that Mr. Vishwanatha Sastri did not rely upon section 6.

Section 15 no doubt confers a power to enter lands and property of others to effect repairs or to prevent accidents. One can hardly dispute that it is the normal duty of Canal Authorities to make repairs and execute works to prevent accidents. But Article 2 cannot apply to omissions in following the statutory duties because it cannot be suggested that these are 'in pursuance of any enactment'. Cases of malfeasance, misfeasance or non-feasance may or may not have statutory protection. Act or omission which can claim statutory protection or is alleged to be in pursuance of a statutory command may attract Article 2 but the act or omission must be one which can be said to be *in pursuance of an enactment*. Here the suit was for compensation for damages consequent on a break in the canal on 15th August, 1947. The only act or omission could be the opening and closing of the channel for silting operations. That was before June, 1946. The third column of Article 2 provides the start of the limitation of 90 days—"when the act or omission takes place". The period of limitation in this case would be over even before the injury if that were the starting point.

This subject was elaborately discussed in *Mohamad Sadaat Ali Khan v. Administrator, Corporation of City of Lahore*¹, where all rulings on the subject were noticed. Mahajan, J. (as he then was) pointed out that "the act or omission must be those which are honestly believed to be justified by a statute." The same opinion was expressed by Courtney Terrell, C.J., in *Secretary of State v. Lodna Colliery Co. Ltd.*², in these words :—

"The object of the article is the protection of public officials, who, while *bona fide* purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a *bona fide* belief by the official that the act complained of was justified by the statute; secondly, the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection."

These cases have rightly decided that Article 2 cannot apply to cases where the act or omission complained of is not alleged to be in pursuance of statutory authority. It is true that in *Commissioners for the Port of Calcutta v. Corporation of Calcutta*³, the Judicial Committee, while dealing with section 142 of the Calcutta Port Act (III of 1890) which read :—

"No suit shall be brought against any person for anything done or purporting or professing to be done in pursuance of this Act, after the expiration of three months from the day on which the cause of action in such suit shall have arisen."

pointed to the presence of the words "purporting or professing to be done in pursuance of this Act" and observed that they regarded the words as of 'pivotal importance' and that their presence postulated "that work which is not done in pursuance of the statute may nevertheless be accorded its protection if the work professes or purports to be done in pursuance of the statute". But they were giving protection to an act which could legitimately claim to be in pursuance of the Port Act. Here the break in the bank was not that kind of act or omission. It could not claim to be in pursuance of the Canal Act. Nor could the opening or closing of the channel for silting operations, though in pursuance of the Canal Act, be the

1. I.L.R. (1945) Lah. 523 (F.B.)

2. I.L.R. 15 Pat. 510.

3. L.R. 64 I.A. 363 : (1937) 2 M.L.J. 594.

relevant act or omission because they were more than appear before the cause of action and to apply a limitation of 90 days to that cause of action is not only impossible but also absurd. Article 2, therefore does not apply here. It was not contended before us that the suit was otherwise time barred and we accordingly confirm the finding that the suit was within time.

The result thus is that the appeal filed by the State Government fails and I would dismiss it with costs and allow the appeal filed by the plaintiff with costs. I would modify the judgment and decree of the High Court by altering the amount of Rs. 14,130 to Rs. 20,000 as ordered by the trial Judge.

Mudholkar, J—I agree with my brethren Sarkar and Hidayatullah that the appeal preferred by the defendant, the State of Punjab, be dismissed and the appeal preferred by the plaintiff, the Modern Cultivators, be allowed and the decree for damages be restored to the sum awarded by the trial Court. I also agree with the order for costs as proposed.

I wish to add nothing with regard to the plaintiff's appeal to what has been said by my brother Hidayatullah nor to what he or my brother Sarkar had said regarding the question of limitation raised on behalf of the defendant. They have both held that Article 2 of the Limitation Act is not attracted to a case like the present where the damages sustained by the plaintiff are not the result of anything done by the State in pursuance of a statutory power exercised by it or by reason of an act which could properly be said to have been performed in the purported exercise of a statutory power. If Article 2 is out of the way, it is not disputed on behalf of the State that the suit will be within time.

My learned brother Hidayatullah has referred to the rule of common law as to strict liability with respect to damages resulting from the escape of deleterious substances or cattle from the land which have been accumulated or brought on the land by its owner for his use and which were not natural there. The rule was stated thus in *Rylands v Fletcher*¹, by Blackburn, J.

We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape.

It was approved by the House of Lords, but Lord Cairns laid down a new principle distinguishing the natural from the non natural user of land and holding that in the latter case only was the liability absolute (see Salmond on Torts, 13th Edition page 579). This rule has been adopted in this country in several cases (see *Gooroo Churn v Ram Dutt*², *Dhanusso v Sitabat*³ and several other cases) and can, therefore, be regarded as a part of the common law of the land. In the country of its origin, this rule has been subjected to certain exceptions. The present case falls in one of the exceptions recognised in some, though not, all cases. It has been held in some cases that where the owner or occupier of land accumulates a deleterious substance thereon by virtue of an obligation imposed upon him by a statute or in exercise of statutory authority he will not be rendered liable for damages resulting therefrom to other persons unless it is established that he was guilty of negligence in allowing the deleterious substance to escape. In a recent decision *Dunne v North Western Gas Board*⁴, the Court of Appeal has recognised this exception and the controversy may be said to have been set at rest, subject of course, to what the House of Lords may have to say hereafter. Indeed, the liability to pay damages to another resulting from an act of a person is laid upon him by the law of torts upon the basis that his act was wrongful and that he was a wrong-doer. Where, therefore, the act consists of something which the law enjoins upon that persons to do or which

1 (1868) L.R. 3 H.L. 330

2 (1865) 2 W.R. 43

3 I.L.R. (1919) Nag. 698

4 (1964) 2 W.L.R. 164

the law permits him to do, it cannot possibly be said that his mere act in doing that something was in itself wrongful and that he was a wrong-doer. He will, however, be liable if he performed the act in a negligent manner or if the escape of the deleterious substance subsequent to accumulation of that substance in exercise of a statutory authority was the result of his negligence. There is nothing here to show that in constructing the canal under the powers conferred by Northern India Canal and Drainage Act, 1873 the State did anything other than what the law permitted. Therefore, by constructing the canal and allowing water to flow along it the State merely exercised its statutory authority. Further, there is nothing to show that there was any want of care in constructing the canal and so no question of negligence will arise in constructing the canal and allowing water to flow along the canal in question. Here, what has happened is that at the point where prior to 1946 the water from the canal was allowed to flow into the silting tank through a *nalluh*, there was an opening which was plugged in that year. Here, it is established that over a year after that opening was plugged by the State a breach of about 30 or 40 feet was caused. This occurred on 15th August, 1947. It has not been shown that the breach could have been caused by an act of God or an act of third party. The contention of the State that it was caused by heavy rains in the catchment area has not been found to be true. If, therefore, there is material from which it could be inferred that the breach was caused by reason of negligence on the part of the State in inspecting the banks of the canal and in particular that portion of it where the breach had been caused the State would be liable in damages. This would be so not by the operation of the rule in *Rylands v. Fletcher*¹, but by reason of negligence.

The sole ground upon which the liability of the State could be established in this case would be negligence of the State in properly maintaining the banks of the canal. For this purpose it would be relevant to consider whether there were periodical inspections, whether any breaches or the development of cracks were noticed along the banks of the canal and in particular at the place where the breach ultimately occurred or whether any erosion of the banks particularly at place where one of the banks had been plugged had been noticed and no action or timely action had been taken thereon. There is evidence to show that the canals were being regularly inspected. That, however, is not the end of the matter. Immediately after the breach occurred some reports were made and as pointed out by my brethren in their judgments they were not placed before the Court despite its order requiring their production. When the matter went up before the High Court it was said that the records had been destroyed in the year 1958 or so and therefore they could not be furnished. This action on the part of the State is manifestly unreasonable and the legitimate inference that could be drawn from it is that if the documents had been produced they would have gone against the State and would establish its negligence. In these circumstances I would hold that though the plaintiffs have been enabled to adduce positive evidence of negligence it could legitimately be presumed that the State was negligent inasmuch as it had deliberately suppressed evidence in its possession which could have established negligence. In the circumstances of this case I do not think it appropriate to refer to the rule of evidence *res ipsa loquitur*.

K.S.

*Appeal by plaintiff allowed
and appeal by defendant dismissed.*

1. (1868) L.R. 3 H.C. 330.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Harinagar Cane Farm, M/s Motipur Zamindary Co. (P.), Ltd. . . Appellants*

v.

The State of Bihar and others

. . Respondents.

*Industrial Disputes Act (XIV of 1947), section 2 (j)—Industry—Limited companies—Organization of agricultural operations as a trade or business and for making profits—Would be industry within the scope of the Act.**Industrial adjudication—Need to restrict to facts of case—No general or broad principles to be laid down*

The companies, for the purpose of carrying on the agricultural operations, have invested a large amount of capital and invested for the purpose of making profits. The workmen employed by them in their respective operations contribute to the production of agricultural commodities which bring in profit to the companies. Therefore even the narrow traditional requirements of the concept of trade or business are, in that sense, satisfied by the agricultural operations carried on by the companies. These limited companies have been formed *inter alia* for the express purpose of carrying on agricultural trade or business. The said operations are organized by them and carried on as a trade or business. The plea that this organized trade or business will not fall within section 2 (j) of the Industrial Disputes Act simply and solely for the reason that it is an agricultural operation cannot be sustained.

In dealing with industrial matters, industrial adjudication should refrain from enunciating any general principles or adopting any doctrinaire considerations. It is desirable that industrial adjudication should deal with problems as and when they arise and confine its decisions to the points which strictly arise out of the pleadings between the parties. If in reaching any conclusion while dealing with the narrow aspect raised by the parties before it, industrial adjudication has to evolve the principle it should and must, no doubt, attempt to do so, but in evolving the principle, care should be taken not to lay down an unduly general or broad proposition which may affect facts and circumstances which are before industrial adjudication in the particular case with which it is concerned.

Appeals by Special Leave from the Judgment and Order dated 18th November, 1959 of the Patna High Court, in Misc. Judl. Cases Nos. 287 and 498 of 1958.

Ganpat Rai and Lalit Kumar, Advocates, for Appellant (in C.A. No. 349 of 1962).

M. C. Setalvad, Senior Advocate (Naunit Lal, Advocate, with him), for Appellant (In C.A. No. 31 of 1961).

D. Goburdhun, Advocate, for Respondent No. 1 (In C.A. 349 of 1962).

M. K. Ramamurthi, S. C. Agarwala, D.P. Singh and R. K. Garg, Advocates of M/s. Ramamurthi & Co, for Respondent No 3 (In C.A. No. 349 of 1962).

S. P. Varma, Advocate, for Respondent No 1 (In C.A. No. 31 of 1961).

P. K. Chatterjee, Advocate, for Respondent No. 3 (In C.A. No 31 of 1961).

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question which arises in these appeals is whether the agricultural operations carried on by the two appellants respectively constitute an industry within the meaning of section 2 (j) of the Industrial Disputes Act, 1947 (XIV of 1947) (hereinafter called "the Act"). An industrial dispute raised by the workmen of the two respective appellants had been referred for adjudication by respondent No. 1, the State of Bihar, to an Industrial Tribunal under section 10 (1) of the Act. Both the appellants then moved the Patna High Court for an appropriate writ under Article 226 of the Constitution on the ground that the agricultural operations carried on by them did not constitute an industry under the Act, and so, respondent No 1 had no jurisdiction to make the impugned orders of reference under section 10 of the Act. The High Court has repelled this contention and has held that the agricultural operations carried on by the appellants respectively constitute an industry, and so, the two impugned orders of reference are perfectly valid under section 10. It is against these orders passed by the Patna High Court in the two petitions filed by the respective appellants that they have come to this Court by Special Leave; and the short question which falls for our decision is in regard to the applicability of section 2 (j) of the Act to the appellant's operations in question.

Messrs. Motipur Zamindari Co. (Pvt.), Ltd., which is the appellant in C.A. No. 31 of 1961 is a private limited company registered under the Indian Companies Act. It mainly produces sugarcane for sale to Motipur Sugar Factory Private, Ltd., Motipur, Muzaffarpur, in pursuance of an agreement under the provisions of the Bihar Sugar Factories Control Act, 1937, and the Rules framed thereunder. It also produces wheat, paddy and other articles for sale in the market either to the consumers or to wholesale dealers. Besides, it undertakes contract work of the Motipur Sugar Factory, such as maintaining tram-lines, maintaining weigh-bridge at Paharchak, operating lake-pumps, loading and unloading of canes and letting buildings on hire.

Messrs. Harinagar Cane Farm which is the appellant in C.A. No. 349 of 1962, had been purchased by the Harinagar Sugar Mills, Ltd., in March, 1956, and since then is functioning as a department of the said Mills. It is a subsidiary concern of the Mills and a part of the organisation of the Mills itself. Thus, the Mills through this section produces sugar for its own purpose. It is in the background of this character of the respective appellants that the question raised by the present appeals has to be determined.

Mr. Setalvad for the appellants contends that in determining the question as to whether section 2 (j) of the Act includes agricultural operations, it would be necessary to bear in mind certain general considerations. He concedes that the words used in section 2 (j) if they are liberally construed in their fullest amplitude, may perhaps be wide enough to include agriculture and agricultural operations; but he emphasises the fact that the legislative history for more than 50 years in this country shows that a sharp distinction is drawn between industry on the one hand and agriculture on the other. In this connection, he relies on the provisions of Article 43 of the Constitution which refers to workers classified as agricultural, industrial, or otherwise when it provides that the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers a living wage and other amenities specified in the said Article. The argument is, when referring to workers, the Constitution has recognised a difference between agricultural workers on the one hand and industrial workers on the other. It is also pointed out that the same distinction is made in the relevant entries in the different Lists of the Seventh Schedule. Entries 14 and 18 in the State List, for instance, refer respectively to agriculture, including agricultural education and research, protection against pests and prevention of plant diseases, and land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; and colonization, whereas Entry 24 refers to industries subject to the provisions of Entries 7 and 52 of List 1. Reliance is also placed on Entry 22 in the Concurrent List which relates to Trade Unions; industrial and labour disputes. The argument is that agriculture has been left, in the main, to the jurisdiction of the State Legislatures and in doing so, a distinction has been recognised between agriculture on the one hand and industry on the other. It is further suggested that where the Legislature wants to include agriculture within the scope of its industrial legislation, it makes a specific and express provision in that behalf; and in support of this argument, reliance is placed on the provisions of section 3 (19) of the Bombay Industrial Relations Act, 1946 (XI of 1947). Section 3 (19) which defines an industry, provides that 'industry' means, *inter alia*, agriculture and agricultural operations. Mr. Setalvad, therefore, argues that if this broad distinction between agriculture and industry is borne in mind, it should not be difficult to exclude agricultural operations from the purview of section 2 (j) of the Act. He has also asked us to take into account the fact that if we were to hold that all agriculture and agricultural operations fell within section 2 (j) it may have an incalculable impact upon the agricultural economy of this country. There is, no doubt, considerable force in this argument.

On the other hand, it has been urged by the respondents that it would be erroneous to suggest that the industrial law enacted by the Act intends to exclude from application of its beneficial provisions agriculture and agricultural operations.

In support of this argument, reliance is placed on the provisions of the Minimum Wages Act (II of 1948) Section 2 (g) of this Act defines "scheduled employment" as meaning an employment specified in the Schedule, or any process or branch of work forming part of such employment, and when we turn to Part II, of the Schedule, it expressly provides employment in agriculture, that is to say *inter alia*, in any form of farming including the cultivation and tillage of the soil, dairy farming, the production cultivation growing and harvesting of any agricultural or horticultural commodity. This shows that one of the important statutory enactments passed for the benefits of workers expressly includes within its purview workers employed in agriculture as defined in Part II of the Schedule.

Similarly it is urged that where the Legislature wants to exclude agriculture from the scope of industrial legislation, it sometimes takes care to make a specific provision in that behalf and this argument is sought to be supported by reference to section 4 of the Australian Commonwealth Conciliation and Arbitration Act, 1904, which defines an "industrial dispute" as meaning

a dispute in relation to industrial matters extending beyond the limits of any one State including disputes in relation to employment upon State railway or to employment in industries carried on by or under the control of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State but it does not include dispute relating to employment in any agricultural viticultural, horticultural or dairying pursuit.

The argument is that the word 'industry' in its broadest connotation which is intended by section 2 (j) would include agriculture, and if the Legislature had intended that agriculture should be excluded from the scope of the said definition it would have adopted the precedent of the Australian law while enacting section 2 (j). According to this argument, the provisions of section 3 (19) of the Bombay Act are merely clarificatory and they indicate that the Legislature made an express provision for including agriculture in order to avoid any doubt in the matter. The respondents, therefore, contend that there is no reason why the Court should limit or circumscribe the broad and wide meaning of the word 'industry' as defined in section 2 (j).

The respondents also relied on the provisions contained in clause (iii) of the *Explanation* to section 25 A of the Act in support of the argument that agriculture must be deemed to be included within the meaning of section 2 (j). Section 25 A occurs in Chapter V A which deals with lay-off and retrenchment. It lays down that the provisions contained in sections 25 C to 25 E in the said Chapter will not apply to the industrial establishments specified by clauses (a) and (b) of section 25 A (1) and the *Explanation* defines what an industrial establishment means in sections 25 A 25 C 25 D and 25 E. Clause (iii) of this *Explanation* shows that the expression "industrial establishment" in the relevant provisions means a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (LXI of 1951). When we turn to the provisions of this section we find that a 'plantation' means any plantation to which the said Act applies, either wholly or in part, and includes other establishments which it is unnecessary to refer. Section 1, sub section (4) indicates to what plantations the said Act applies. It is thus clear that the plantations to which the Plantations Labour Act, 1951 applies are expressly included within the expression "industrial establishment" as explained by the *Explanation* to section 25 A of the Act. The argument is that this *Explanation* indicates that agriculture of which plantations are a part, is not intended to be excluded from the operation of the Act.

In dealing with the present appeals we do not propose to decide the large question as to whether all agriculture and operations connected with it are included within the definition of section 2 (j). As we have repeatedly emphasised, in dealing with industrial matters, industrial adjudication should refrain from enunciating any general principles or adopting any doctrinaire considerations. It is desirable that industrial adjudication should deal with problems as and when they arise and confine its decisions to the points which strictly arise on the pleadings between the

parties. If in reaching any conclusion while dealing with the narrow aspect raised by the parties before it, industrial adjudication has to evolve some principle, it should and must, no doubt, attempt to do so, but in evolving the principle, care should be taken not to lay down an unduly general or broad proposition which may affect facts and circumstances which are not before industrial adjudication in the particular case with which it is concerned. Bearing in mind the importance of adopting this approach in dealing with industrial matters, we propose to deal with the narrow question as to whether agricultural operations carried on by the two appellants constitute an industry under section 2 (j) or not. There is no doubt that for carrying on the agricultural operations, the appellants have invested a large amount of capital, and it is not disputed that the appellants have invested capital for carrying on their agricultural operations for the purpose of making profits. It is also common ground that the workmen employed by the appellants in their respective operations contribute to the production of agricultural commodities which bring in profit to the appellants. Therefore, even the narrow traditional requirements of the concept of trade or business are, in that sense, satisfied by the agricultural operations of the appellants.

What is more important in the present appeals is that the appellants are limited companies which have been formed, *inter alia*, for the express purpose of carrying on agricultural trade or business. We have noticed how the agricultural operations carried on by the appellants are within their objects, and so, there is no difficulty whatever in holding that the said operations are organised by the appellants and carried on by them as a trade or business would be carried on by any trader or business man. When a company is formed for the purpose of carrying on an agricultural operation, it is carrying on trade or business and a plea raised by it that this organised trade or business does not fall within section 2 (j) simply and solely for the reason that it is an agricultural operation, cannot be sustained. Incidentally, it may be relevant to refer to the fact that in resisting the argument urged by its workmen against the competence of Mr. Sinha to appear for it, the appellant Motipur Zamindari Co., Ltd., stated before the Tribunal that the Sugar Mills Association of which Mr. Sinha happens to be an office-bearer is connected with the industry in which the Zamindari Co., is engaged, and so, Mr. Sinha had a right to represent the management of the appellant in the proceedings before the Tribunal. In other words, it is significant that the appellant expressly admitted that it was a part of the industry, the Association of which had employed Mr. Sinha as its office-bearer. Apart from this aspect, however, we have no hesitation in holding that the High Court was right in coming to the conclusion that the agricultural operations carried on by the two respective appellants are an industry under section 2 (j).

Before we part with these appeals, we may refer to four decisions of this Court where this question has been considered. In *D. N. Banerji v. P. R. Mukherjee and others*¹, this Court had occasion to examine the full significance and import of the words 'industry' and 'industrial dispute' as defined by section 2 (j) and (k) of the Act. It has been urged by the respondents that this decision supports their argument that section 2 (j) includes all agriculture and agricultural operations, and in support of this proposition, they have invited our attention to the statement in the judgment delivered by Chandrasekhara Aiyar, J., where it is observed that the concept of industry in the ordinary non-technical sense applies even to agriculture, horticulture, pisciculture and so on and so forth. We are not impressed by this argument. The context in which this sentence occurs shows that the Court was there dealing with the ordinary non-technical sense according to what is understood by the man in the street as the denotation of the word 'industry' or business, and so, the observations made in that connection cannot be taken to amount to the broad and unqualified proposition that agriculture of all kinds is included in section 2 (j). The decision in that case was that disputes that might arise between municipalities and their employees in branches of work that can be said to be analogous to the carrying on of a trade or business, fall under section 2 (k).

1. (1953) S.C.J. 19: (1953) 1 M.L.J. 195: (1953) S.C.R. 302 at p. 307.

of the Act. It is in the light of this decision that the observations on which the respondents rely must be read.

In *the State of Bombay and others v The Hospital Mazdoor Sabha and others*¹, this Court has had occasion to examine elaborately the implications of the concept of industry as defined by section 2 (j). But it may be pointed out that one of the considerations which weighed with this Court in dealing with the dispute raised by the appellant in that case was that in the First Schedule to the Act which enumerates industries which may be declared as public utility service under section 2 (a) (vi), three entries had been added by Act XXXVI of 1956. One of these was services in hospitals and dispensaries and so, it was clear that after the addition of the relevant entry in the First Schedule it would not have been open to anybody to suggest that service in hospitals does not fall under section 2 (j).

In *The Ahmedabad Textile Industry's Research Association v The State of Bombay and others*², this Court held that the activities of the Research Association amounted to an industry, because the manner in which the Association had been organised showed that the undertaking as a whole was in the nature of business and trade organised with the object of discovering ways and means by which member mills may obtain larger profits in connection with their industries. In other words, though the work was one of research and in that sense, of an intellectual type, it had been so organised as to form part of a department of the textile industry itself. That is why it was held that the appellant in that case was an employer and his activity was an industrial activity within the meaning of section 2 (j).

On the other hand, the decision in the case of *National Union of Commercial Employees and another v M R Mehar, Industrial Tribunal, Bombay and others*³, was cited where this Court was called upon to consider whether the office of a Solicitor's firm was an employer and the work carried on in his office an industry under section 2 (j). It was held that though the work of a Solicitor is, in a loose sense, business, it could not be treated as an industry under section 2 (j) because the essential attribute of an industrial dispute was lacking in such a case, the essential basis of an industrial dispute, it was observed, is that it is a dispute arising between capital and labour in enterprises where capital and labour combine to produce commodities or to render service, and that could hardly be predicated about a liberal profession like that of a Solicitor. A person following a liberal profession cannot be said to carry on his profession in any rational sense with the active co-operation of his employees, because it is well known that the main capital which a person following a liberal profession contributes is his special or peculiar intellectual and educational equipment. It is on these grounds that the Act was held to be inapplicable to a Solicitor's firm. We have referred to these decisions only to emphasise the point that this Court has consistently refrained from laying down unduly broad or categorical propositions in dealing with the somewhat difficult disputes which the definition contained in section 2 (j) raises before industrial adjudication. In the present case, the dispute raised lies within a narrow compass and it is on that narrow basis that we have decided it.

In the result, the appeals fail and are dismissed with costs.

V S

Appeals dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH, AND N. RAJAGOPALA AYYANGAR, JJ.

M/s. Basti Sugar Mills Ltd.

.. Appellant *

v.

Ram Ujagar and others

.. Respondents.

Uttar Pradesh Industrial Disputes Act (XXVIII of 1947), section 2 (i) (iv) and (z)—“Employer” “Workmen”—Workmen employed by contractor—If employees.

The effect of sub-clause (iv) of section 2 (i) of the U. P. Industrial Disputes Act is that where the owner of any industry in the course of or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily a part of the industry, the owner of such industry is an employer within the meaning of the Act of the workmen engaged in the work which is done through contract. The words of section (2) (z) defining “workmen” are sufficiently wide to bring in persons doing work in an industry whether the employment was by the management or by a contractor of the management. These provisions are in the interests of the general public and cannot be said to contravene Article 19 (1) (g) of the Constitution.

In the definition of “workmen” in the Standing Orders as “any person” employed by a factory does not make any difference and are wide enough to include workmen employed by the contractors of the factory also.

Appeal by Special Leave from the Award dated 26th November, 1962 of the Labour Court, Lucknow, in Adjudication Case No. 68 of 1962.

G. S. Pathak, Senior Advocate, (*D. N. Mukherjee*, Advocate with him), for Appellant.

M. Rajagopalan and K. R. Chaudhuri, Advocates, for Respondents.

The judgment of the Court was delivered by

DAS GUPTA, J.—The twenty-one persons who are the respondents in this appeal were engaged from 21st November, 1958 to 5th February, 1959 in the work of removal of press-mud in the sugar factory belonging to the appellant. On 6th February, 1959, their services were terminated. It also appears that for the period of work of 21st November, 1959 to 5th February, 1959 they were paid wages at rates lower than Rs. 55 per month which was the minimum prescribed wage for workmen of vacuum pan sugar factories of Uttar Pradesh under the Standing Orders dated 3rd October, 1958, issued by the Government of Uttar Pradesh. On 31st July, 1962, the Governor of Uttar Pradesh referred to the Labour Court, Lucknow, a dispute between these respondents and the Basti Sugar Mills Ltd. In this the Basti Sugar Mills Ltd., was described as the employers and the respondents as their workmen. The matters in dispute were thus mentioned in the order of reference:

- (1) Whether the employers have terminated the services of their workmen, named in the Annexure, with effect from 6th February, 1959, legally and/or justifiably? If not, to what relief are the workmen concerned entitled?
- (2) Whether the action of the employers in paying to the workmen, named in the Annexure to Issue No. 1, at rates lower than the minimum prescribed wage of Rs. 55 per month, for the period from 21st November, 1958 to 5th February, 1959 is legal and/or justified. If not, to what relief are the workmen concerned entitled and with what details?

The appellant contended that these 21 workmen were not employed by the management of the sugar mills. The appellant's case was that the work of removal of press-mud had been given by the Company to a contractor, Banarsi Das, and that these 21 men were employed by that contractor to do the work. The management of the Company, it was said, had nothing to do with these men. Banarsi

Das left the work on 6th February, 1959 and the termination of the services of these workmen was made by him. The respondents through their Union contended, on the contrary, that they had been employed directly by the management of the Company.

On a consideration of the evidence the Labour Court accepted the appellant's case that the work of removal of press mud was being done through the contractor Banarsi Das and it was Banarsi Das under whom these 21 persons were employed. It further held that in view of the definition of "employer" in sub clause (iv) of section 2 (i) of the Uttar Pradesh Industrial Disputes Act, 1947, the appellant was in law the employer of these 21 persons. It held accordingly that they were entitled to the benefit of the Standing Orders regarding minimum wages and were also entitled to reinstatement. In that view the Labour Court ordered (a) payment to the workmen at the rate of Rs 55 per month from 6th February, 1959 upto the end of the crushing season of 1958-59, (b) reinstatement of the workmen if not already employed by the Company in the crushing season of 1962-63, and (c) payment of difference of wages computed at the rate of Rs 55 per month and Re 1 per day in the case of Ram Ujagar and 14 annas per day in the case of other workmen for the period 21st November, 1958 to 5th February, 1959.

Against this order of the Labour Court the present appeal has been filed by the Company with the Special Leave of this Court.

Three points are raised by Mr Pathak in support of the appeal. The first is that the definition of "employer" in sub-clause (iv) of section 2 (i) of the Act does not make the appellant, the employer of these workmen. The second point, urged rather faintly, is that if the above definition be so construed as to make the contractor's labourers, workmen of the company the definition should be held to violate the provisions of Article 19 (1) (g) of the Constitution. The third point urged is that, in any case, the respondents are not entitled to the benefit of the Standing Orders which fixed the minimum wage for the workmen of the vacuum pan sugar factories of Uttar Pradesh.

Section 2 (i) of the Act contains an inclusive definition of employer. The effect of sub clause (iv) of section 2 (i) is that where the owner of any industry in the course or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily a part of the industry, the owner of such industry is an employer within the meaning of the Act. Mr Pathak's suggestion that the effect of this definition is that the owner of the industry becomes the employer of the contractor is wholly untenable and can even be described as fantastic to deserve serious consideration. The obvious purpose of this extended definition of the word "employer" is to make the owner of the industry, in the circumstances mentioned in the sub clause, the employer of the workmen engaged in the work which is done through contract. The words used in the sub clause are clearly sufficient to achieve this purpose.

It is true, as pointed out by Mr. Pathak, that the definition of the word "workmen" did not contain any words to show that the contract labour was included. That however does not affect the position. The words of the definition of workmen in section 2 (z) to mean,

"any person (including an apprentice) employed in any industry to do any skilled or unskilled manual supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied,

are by themselves sufficiently wide to bring in persons doing work in an industry whether the employment was by the management or by the contractor of the management. Unless however the definition of the word "employer" included the management of the industry even when the employment was by the contractor the workmen employed by the contractor could not

get the benefit of the Act since a dispute between them and the management would not be an industrial dispute between "employer" and workmen. It was with a view to remove this difficulty in the way of workmen employed by contractors that the definition of employer has been extended by sub-clause (iv) of section 2 (i). The position thus is: (a) that the respondents are workmen within the meaning of section 2 (z), being persons employed in the industry to do manual work for reward, and (b) they were employed by a contractor with whom the appellant company had contracted in the course of conducting the industry for the execution by the said contractor of the work of removal of press-mud which is ordinarily a part of the industry. It follows therefore from section 2 (z) read with sub-clause (iv) of section 2 (i) of the Act that they are workmen of the appellant company and the appellant company is their employer. There is no substance therefore in the first point raised by the learned Counsel for the appellant.

The second point, viz., that this definition contravenes the appellant's fundamental rights under Article 19 (1) (g) is equally devoid of substance. Assuming that the result of this definition of employer in sub-clause (iv) of section 2 (i) is the imposition of some restrictions on the appellant's right to carry on trade or business, it cannot be doubted for a moment that the imposition of such restrictions is in the interest of the general public. For, the interests of the general public require that the device of the engagement of a contractor for doing work which is ordinarily part of the industry should not be allowed to be availed of by owners of industry for evading the provisions of the Industrial Disputes Act. That these provisions are in the interests of the general public cannot be and has not been disputed. That being the position, the impugned definition which gives the benefit of the provisions of the Act to the workmen engaged under a contract in doing work which is ordinarily part of the industry cannot but be held to be also in the interests of the general public.

This brings us to Mr. Pathak's main contention that in any case the respondents are not "workmen" within the meaning of the Standing Orders and so cannot get the benefit of the minimum wage prescribed thereby. In the Standing Orders the word "workmen" is defined to mean "any person (including an apprentice) employed by a factory, to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward whether the terms of employment be express or implied" but does not include any person mentioned in clauses (i) and (ii). We are not concerned in this case with these clauses. Mr. Pathak argues that on a reasonable construction, the words "employed by a factory" in this definition can only mean "employed by the management of the factory" and cannot include persons employed by a contractor of the factory. He points out that this definition of "workmen" in the Standing Orders uses the words "employed by a factory" though the definition of "workmen" in the Act itself uses the words "employed in any industry" and contends that the words "by a factory" were deliberately used instead of the words "in a factory" to exclude persons other than those employed by the management of the factory from the benefit of the Standing Orders. Neither grammar nor reason supports this argument.

On the ordinary grammatical sense of the words "employed by a factory" they include, in our opinion, every person who is employed to do the work of the factory. The use of the word "by" has nothing to do with the question as to who makes the appointment. The reason why "by" was used instead of "in" appears to be to ensure that if a person has been employed to do the work of the industry, whether the work is done inside the factory or outside the factory, he will get the benefit of the Standing Orders.

We can also see no reason why the Government in making the Standing Orders would think of denying to some of the persons who fall within the definition of workmen under the Act, the benefit of the Standing Orders. The Stand-

ing Orders were made under section 3 (b) of the Act under which the State Government may make provision,

"for requiring employers, workmen or both to observe for such period as may be specified in the order such terms and conditions of employment as may be determined in accordance with the order"

The purpose of the order was thus clearly to require employers to observe certain terms and conditions of employment of their workmen as defined in the Act. It is unthinkable that in doing so the Government would want to exclude from its benefits—particularly, that of the minimum wage—a class of workmen who would otherwise get the benefit under the definitions of workmen and employer in the Act itself. No reason has been suggested and we cannot think of any.

We have therefore come to the conclusion that the words "employed by a factory" are wide enough to include workmen employed by the contractors of factory also.

Mr Pathak wanted to raise a new point based on the provisions of clause (K) of the Standing Orders. That clause provides that a seasonal workman who has worked or, but for illness or any other unavoidable cause, would have worked under a factory during the whole of the second half of the last preceding season will be employed by the factory in the current season. In view of this, Mr. Pathak wants to urge that it will be difficult for the appellant to give effect to the order of reinstatement of these 21 workmen as that would mean getting rid of at least some workmen who are entitled to be employed by the factory under the provision of clause (K). If the facts were known to be as suggested by the learned Counsel we would have felt obliged to take note of these provisions of clause (K) and would have thought fit to make an order as was made by this Court in similar circumstances in *Mahalakshmi Sugar Mills Company Ltd v Their Workmen*, making it clear that these 21 workmen should be re-employed in the crushing season of 1962-63 only in so far as it was possible to do so without breach of the provisions of clause (K) of the Standing Orders. There are no materials on the record however to show how many of the workmen already employed by the Company in the crushing season of 1962-63 had actually worked in the latter half of 1961-62 season. In the written statement of the Company no such point about the difficulty of reinstatement of any of these 21 workmen because of the provisions of clause (K) was raised. In these circumstances, we have not allowed Mr Pathak to raise this new plea for the first time in this Court.

As all the points raised in the appeal fail, the appeal is dismissed with costs.

K. S.

Appeal dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —S. K. DAS, A. K. SARKAR, AND M. HIDAYATULLAH, JJ

Raizada Topandas and another

. . Appellants*

v.

M/s Gorakhram Gokalchand

. . Respondents.

Practice—Jurisdiction—Determination by allegations in plaint—Allegation made by defendants—If can be looked into—General principles—Bombay Rents Hotels and Lodging House Rates Control Act (Bombay Act LVII of 1947), section 28—Scope of—Jurisdiction of the Small Causes Court under—Plaintiff, a tenant—Suit against defendant on the plea that defendant is licensee. Question of license or sub-tenancy—Not a question arising out of the Act or any of its provisions—Cognisability by City Civil Court

The plaintiff who was in possession of the shop as a tenant filed a suit against the defendant in the City Civil Court, Bombay, on the allegation that the defendant was a licensee in pursuance of an agreement between the parties, for a declaration that the defendant had no longer any right to enter the shop and/or remain in possession and for consequential injunction. On the question whether the suit was cognizable by the City Civil Court, Bombay, in view of the provisions contained in section 28 of the Bombay Rents Hotels and Lodging Houses Rates Control Act,

Held, The general principle that governs the question of jurisdiction at the inception of suits is as follows :—The plaintiff on proving the facts set out in his pleadings will get his relief from the forum chosen. If the suit is framed on unwarranted facts and in a Court which cannot grant him the relief on the true facts, the suit will be dismissed. There would be no question of returning the plaint. If on the trial on the issue of jurisdiction the Court finds against the allegations made by plaintiff and upholding the allegation of defendant, two courses are open. (1) If the jurisdiction relates to pecuniary or territorial limits, the plaint will be returned to be presented to the proper Court ; (2) If having regard to the nature of the suit it is not cognisable by the Court, the suit will have to be dismissed.

The operative part of sub-section (1) of section 28 refers to two matters. (a) any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of Part II apply and (b) any application made under the Act or any claim or question arising out of this Act or any of its provisions.

Section 28 no doubt gives exclusive jurisdiction to the Court of Small Causes to entertain and try a suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises to which any of the provisions of Part II apply ; it also gives exclusive jurisdiction to decide any application under the Act and any claim or question arising out of the Act or any of its provisions — all this notwithstanding anything contained in any other law.

The section does not say or intend to say that the plea of the defendant will determine or change the forum. It proceeds on the basis that exclusive jurisdiction is conferred on certain Courts to decide all questions or claims under the Act as to parties, between whom there is or was a relationship of landlord and tenant. It does not invest those Courts with exclusive power to try questions of title, such as questions as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. If, therefore, the plaintiff in his plaint does not admit a relation which would attract any of the provisions of the Act on which the exclusive jurisdiction given under section 28 depends, the defendant cannot by his plea force the plaintiff to go to a forum where on his averments he cannot go.

In order to decide whether a suit comes within the purview of section 28 what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by section 28.

(*Per Sarkar, J.*)—The defence really is that the appellants are not licensees. No doubt the appellants have gone on to say that they are sub-tenants but they say that only to show why they are not licensees ; apart from that it is irrelevant to enquire whether they are sub-tenants or not. The defence is only one of traverse ; it is that the appellants are not licensees as the plaint alleges. That being so, the only question that the suit involves is whether the appellants are licensees of the shop. If they are not licensees, the suit must fail. No other question would fall for decision. Quite clearly, a question whether the defendant is a licensee or not, is not a question nor is it a claim arising out of the Act.

The Act does not create any tenancy. That has to be created by a contract. The question whether the appellants are sub-tenants, that is to say, tenants of a certain kind, is really a question whether a contract of tenancy was made between the appellants and the respondent. That question is not one arising out of the Act for the Act says nothing as to the creation of a tenancy and is only concerned with the regulation of the relations between a landlord and tenant in a tenancy the existence of which is otherwise brought about.

As soon as it is held that the appellants are licensees, the suit has to be decreed. When it is so held it has also been necessarily held that the appellants are not tenants, and, therefore, no further question as to rights of tenants under the Act falls to be decided. If however it is held that the appellants are not licensees but tenants, then on that ground alone the suit has to be dismissed for the claim is not based on any ground other than that the appellants are licensees whose licence has expired. It would not in such an eventuality be necessary further to consider whether the appellants who have been found to be tenants, are entitled to protection from eviction under the Act for the suit involves no claim whatever for ejectment of the appellants considered as tenants. No question, therefore, can possibly arise in the suit as to whether the appellants are entitled to be in possession as tenants by virtue of rights created by the Act.

No argument was advanced by Counsel for the appellants on the basis of section 51 nor the facts necessary for its application appear on the record and the Court was not called upon to express any opinion on the matter

It may be a moot question whether the appellants having on their own statement entered into an agreement to defraud in a manner of speaking the superior landlord of his rights arising under the Act from an unlawful sub-letting can be permitted to say that the real transaction between them and the respondent was a sub-tenancy

Appeal by Special Leave from the Judgment and Decree dated 19th October 1959 of the Bombay High Court in Appeal No 152 of 1959

N C Chatterjee, Senior Advocate, (*J B Dadachanji*, *O C Mathur* and *Ravinder Narain Advocates of M/s J B Dadachanji & Co* with him), for Appellants

A V Viswanatha Sastri, Senior Advocate, (*D D Sharma*, Advocate, with him), for Respondents

The Court delivered the following Judgments

S K Das J (on behalf of himself and *Hidayatullah, J*) —The only question which arises in this appeal is, whether on a proper interpretation of section 28 of the Bombay Rents, Hotels, and Lodging Houses Rates Control Act, 1947 (Bombay Act LVII of 1947) the Court of Small Causes, Bombay, had exclusive jurisdiction to deal with the suit out of which this appeal has arisen

The respondent before us is a partnership firm. It was in possession as a tenant of a shop No 582/638 at Mulji Jetha Market, Bombay. It instituted a suit in the Bombay City Civil Court (to be distinguished from the Court of Small Causes, Bombay) in which it asked for (1) a declaration that it was in lawful possession of shop No 582/638 at Mulji Jetha Market Bombay, and that the present appellants (who were the defendants in the suit) or their family members servants or agents had no right to enter into or remain in possession of the said shop, (2) for an injunction restraining the present appellants, their family members, servants and agents from entering into the said shop, and (3) for an amount of commission payable to it under an agreement dated, 23rd June, 1955. The main averments in the plaint were that by the aforesaid agreement defendant No 1, appellant No 1 before us appointed the respondent as his commission agent for the sale of the appellants' cloth in the shop in question. The agreement was to remain in force for a period of four years expiring on 30th June, 1959. Pursuant to the agreement, the appellants, their family members, servants and agents were allowed by the respondent to visit the shop only for the purpose of looking after the business of commission agency. On the expiry of the agreement the appellants had no further right to enter into the shop and in paras 10 and 11 of the plaint the respondent firm alleged that some commission was due to it and further it asked the appellants not to disturb the possession and peaceful enjoyment of the shop by the respondent, but the appellants, their servants and agents were visiting the shop daily and preventing the respondent from having access to its various articles such as stock in trade, books of account, furniture fixtures, etc. On these averments the respondent firm asked for the reliefs to which we have earlier referred. The plaint proceeded on the footing that during the period of the agreement the appellants were mere licensees, and after the expiry of the agreement they were trespassers and had no right to be in the shop. The plaint in terms negatives any relationship of landlord and tenant as between the parties to the suit.

The substantial defence of the appellants was that the respondent firm had sub let the shop to the appellants at a monthly rent of Rs 500/-, but as no sub-tenancy could be legally created at the time, without the consent of the landlord, by reason of the provisions of the Act, the respondent firm with a view to safeguard its position in regard to the penal provisions of the Act required the

appellants to enter into a sham agreement in the shape of a letter dated 30th June, 1952. The agreement was never acted upon and was intended to be a cloak to conceal the true nature of the transaction. The appellants further alleged that the agreement dated 23rd June, 1955, was also not operative between the parties, and the true relation between the parties was that of landlord and tenant. On these averments in the written statement the appellants took the plea that as the question involved in the suit related to the possession of premises as between a landlord and his tenant, the Court of Small Causes, Bombay, alone had jurisdiction to try the suit.

On these pleadings a preliminary issue as to jurisdiction was framed by the City Civil Court, Bombay, and this issue was in these terms :

"Whether this Court has jurisdiction to entertain and try this suit?"

The learned Judge of the City Civil Court relying on a decision of this Court in *Babulal Bhuramal and another v. Nandram Shivram and others*¹ decided the preliminary issue in favour of the present appellants. He held that in view of the observations of the Supreme Court in the aforesaid decision, an earlier decision of the Bombay High Court in *Govindram Salamatrai v. Dharampal*² which had taken a different view was of no assistance to the present respondent, and must be deemed to have been over-ruled by the Supreme Court decision. We may state here that the decision in *Govindram Salamatrai*³ had itself over-ruled an earlier decision of the same Court in *Ebrahim Salejit v. Abdulla Ali Rezu*⁴ where Gajendragadkar, J., (as he then was) had taken the view that section 28 of the Act included within its jurisdiction all suits and proceedings where the trial Court had to consider all claims or questions arising out of the Act, and it makes no difference whether such claim or question arises from the allegations made in the plaint or those made in the written statement. The learned Judge of the City Civil Court accordingly made an order that the plaint be returned to the present respondent for presentation to the proper Court.

An appeal was taken by the present respondent to the High Court of Bombay from the decision of the learned City Civil Judge. The High Court pointed out in its judgment dated 19th October, 1959, that the ratio of the decision of this Court in *Babulal Bhuramal's case*¹ was correctly explained in a later decision of the Bombay High Court in *Jaswantlal v. Western Company, India*⁴ and on a correct interpretation of section 28 of the Bombay Rents, Hotels, and Lodging Houses, Rates Control Act, the suit out of which this appeal has arisen was not a suit within the exclusive jurisdiction of the Court of Small Causes, Bombay. The High Court said that the decision in *Babulal Bhuramal*¹ did not in effect hold, nor did it justify any interpretation to the effect that section 28 of the Act made a departure from the general principle that governs the question of jurisdiction, which is that jurisdiction at the inception of the suit depends on the averments made in the plaint and is not ousted by the defendant saying something in his defence. In this respect, the High Court accepted as correct the view expressed by Chagla, C. J., in *Govindram Salamatrai*² rather than the view of Gajendragadkar, J., in *Ebrahim Salejit*³. In this view of the matter the High Court held that the City Civil Court has jurisdiction to try the suit out of which the appeal has arisen. It, therefore, set aside the order of the learned City Civil Judge and directed that it should now dispose of the suit in accordance with law. The appellants then asked for Special Leave to appeal to this Court from the judgment and decree of the High Court, and having obtained Special Leave have preferred the present appeal.

1. (1958) S.C.J. 880 : (1959) S.C.R. 367.

2. (1951) 53 Bom. L. R. 386.

3. 52 Bom. L. R. 897.

4. (1929) I.L.R. 64 Bom. L. R. 1087.

5. (1959) I.L.R. 52 All. 501.

The Bombay Rents, Hotels and Lodging Houses Rates Control Act, 1947, was enacted to amend and consolidate the law relating to the control of rents and repairs of certain premises of rates, of hotels and lodging houses, and of evictions. In Part II of the Act there are provisions which make rent in excess of standard rent illegal provisions relating to increase of rent, provisions as to when a landlord may recover possession, when a sub-tenant becomes a tenant, unlawful charges by landlord, etc. All these proceed on the footing that there is or was, at the inception, a relation of landlord and tenant between the parties. In the same Part occur sections 28, 29 and 29 A. Section 28 which we shall presently read deals with jurisdiction of Courts, section 29 deals with appeals, and section 29 A is a section which saves suits involving title. The particular section the interpretation of which is in question before us is section 28 and we shall read only sub-section (1) thereof in so far as it is relevant for our purpose. This sub-section reads—

‘ 28 (1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not but for this provision be within its jurisdiction

(a) in Greater Bombay, the Court of Small Causes Bombay,

(aa) * * * *

(b) * * * *

shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of sub section (2) no other Court shall have jurisdiction to entertain any suit, proceeding or application or to deal with such claim or question ’

Section 29 A also has some relevancy and may be set out here

“ Nothing contained in section 28 or 29 shall be deemed to bar a party to a suit proceeding or appeal mentioned therein in which a question of title to premises arises and is determined from being sung in a competent Court to establish his title to such premises ’

Leaving out what is unnecessary for our purpose section 28 (1) states that notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not but for this provision, be within its jurisdiction, the Court of Small Causes in Greater Bombay shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part (meaning thereby Part II) apply and to decide any application made under the Act and to deal with any claim or question arising out of the Act or any of its provisions and no other Court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with any such claim or question. It is to be noticed that the operative part of the sub section refers to two matters (a) any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of Part II apply and (b) any application made under the Act or any claim or question arising out of this Act or any of its provisions. What is the true effect of sub section (1) of section 28 with regard to the aforesaid two matters? Does it mean that if the defendant raises a claim or question as to the existence of a relationship of landlord and tenant between him and the plaintiff, the jurisdiction of the City Civil Court is ousted even though the plaintiff pleads that there is no such relationship, and the only Court which has exclusive jurisdiction to try the suit is the Court of Small Causes, Bombay? That is the question before us

In answering this question it is perhaps necessary to refer to the general principle which admittedly governs the question of jurisdiction at the inception of suits. This general principle has been well explained in the Full Bench decision of the Allahabad High Court, *Ananti v Chann*,¹ and has not been disputed before us. It was observed there,

"The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen. If he frames his suit in a manner not warranted by the facts, and goes for his relief to a Court which cannot grant him relief *on the true facts*, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper Court, for the plaint, as framed, would not justify the other kind of Court to grant him the relief If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognisable by the Court, there will be two kinds of orders to be passed. If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper Court. If, on the other hand, it is found that, having regard to the *nature* of the suit, it is not cognizable by the class of Court to which the Court belongs, the plaintiff's suit will have to be dismissed in its entirety."

Having regard to the general principle stated above, we think that the view taken by the High Court in this case is correct. Section 28 no doubt gives exclusive jurisdiction to the Court of Small Causes to entertain and try a suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises to which any of the provisions of Part II apply; it also gives exclusive jurisdiction to decide any application under the Act and any claim or question arising out of the Act or any of its provisions—all this notwithstanding anything contained in any other law. The argument of learned Counsel for the appellants is that the section in effect states that notwithstanding any general principle, all claims or questions under the Act shall be tried exclusively by the Courts mentioned in the section, *e.g.*, the Court of Small Causes in Greater Bombay, and it does not matter whether the claim or question is raised by the plaintiff or the defendant. The argument is plausible, but appears to us to be untenable on a careful scrutiny. We do not think that the section says or intends to say that the plea of the defendant will determine or change the forum. It proceeds on the basis that exclusive jurisdiction is conferred on certain Courts to decide all questions or claims under the Act as to parties, between whom there is or was a relationship of landlord and tenant. It does not invest those Courts with exclusive power to try questions of title, such as questions as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. If, therefore, the plaintiff in his plaint does not admit a relation which would attract any of the provisions of the Act on which the exclusive jurisdiction given under section 28 depends, we do not think that the defendant by his plea can force the plaintiff to go to a forum where on his averments he cannot go. The interpretation, canvassed for by the appellants will give rise to anomalous results; for example, the defendant may in every case force the plaintiff to go to the Court of Small Causes and secondly, if the Court of Small Causes finds against the defendant's plea, the plaint may have to be returned for presentation to the proper Court for a second time. Learned Counsel for the appellants has argued in the alternative that the Court of Small Causes need not return the plaint a second time, for his contention is that that Court has "exclusive" jurisdiction to decide the case whenever a claim is made under the Act even though the claim is found to be false on trial. We do not think that this contention can be accepted as correct, for to do so would be to hold that the Court of Small Causes has exclusive jurisdiction to decide questions of title, which is clearly negated by section 29-A. Anomalous results may not be a conclusive argument, but when one has regard to the provisions in Part II it seems reasonably clear that the exclusive jurisdiction conferred by section 28 is really dependent on an existing or previous relationship of landlord and tenant and on claims arising under the Act as between such parties.

Dealing with a similar argument in *Goyindram Salamatrai*¹ Chagla, C.J., said :

"There can be no doubt that when a plaintiff files a suit against a defendant alleging that he is his licensee, it is a suit which cannot be entertained and tried by the Small Causes Court because it is not a suit between a landlord and a tenant, and judging by the plaint no question

arises out of the Rent Control Act or any of its provisions which would have to be determined on the plaint as it stands. It cannot be suggested that the plaintiff should anticipate any defence that might be taken up by the defendant that he is a tenant or that the initial jurisdiction which the Court had or which the Court lacked should be controlled or affected by any subsequent contention that might be taken up by the defendant. The jurisdiction of a Court is normally and ordinarily to be determined at the time of the inception of a suit. Therefore when a party puts a plaint on file, it is at that time that the Court has to consider whether the Court had jurisdiction to entertain and try that suit or not. But it is argued that although the Court might have had jurisdiction when the suit was filed, as soon as the defendant raised the contention that he was a tenant the Court ceases to have jurisdiction to try that suit and that contention could only be disposed of by the Small Causes Court by virtue of the provisions of section 28.

Therefore the question that I have to address myself to is whether the question as to whether the defendant is a tenant or licensee is a question which arises out of the Act or any of its provisions. Really, this question is not a question that has anything to do with the Act or any of its provisions. It is a question which is collateral and which has got to be decided before it could be said that the Act has any application at all."

We are in agreement with these observations and we do not think section 28 in its true scope and effect makes a departure from the general principle referred to earlier by us. Nor do we think that the right of appeal given by section 29 affects the position in any way. In respect of a decision given by a Court exercising jurisdiction under section 28, an appeal is provided for in certain circumstances under section 29. This does not mean that section 28 has the effect contended for on behalf of the appellants.

As to the decision of this Court in *Babulal Bhuramal*¹, we do not think that it assists the appellants. We consider that the Bombay High Court correctly understood it in *Jaswantlal v Western Company, India*². In *Babulal Bhuramal's case*¹ the facts were these. A landlord after giving a notice to quit to his tenant on 6th December, 1947, filed a suit against him in the Court of Small Causes, Bombay, joining to the suit two other persons who were alleged to be sub-tenants of the tenant. The landlord's case was that the tenancy of his tenant was validly terminated and he was entitled to evict his tenant, that alleged sub-tenants of the tenant were trespassers who had no right to be on the premises. The suit succeeded in the Small Causes Court, the Court holding that the sub-tenants were not lawful sub-tenants, the sub-letting by the tenant to them being contrary to law. The Small Causes Court, therefore, passed a decree against the plaintiff and the alleged sub-tenants. Therefore, the tenant as plaintiff No. 1 and the alleged sub-tenants as plaintiffs Nos. 2 and 3 filed a suit against the landlord in the City Civil Court for a declaration that plaintiff No. 1 was a tenant of the defendant and was entitled to protection under the Rent Act and that plaintiffs Nos. 2 and 3 were lawful sub-tenants of plaintiff No. 1 and were entitled to possession and occupation of the premises as sub-tenants thereof. A question was raised in the City Civil Court as to whether the City Civil Court had jurisdiction to entertain the suit. The City Civil Court held that it had jurisdiction to entertain the suit, but dismissed it on merits. In the appeal which was filed in the High Court, the High Court dismissed the appeal holding that the City Civil Court had no jurisdiction to entertain the suit and, therefore, the suit filed by the plaintiffs in the City Civil Court was not maintainable. It was from this decision of the High Court that an appeal was filed in the Supreme Court and the question which the Supreme Court had to consider was whether the second suit filed by the plaintiffs was within the jurisdiction of the City Civil Court. It was urged before the Supreme Court that the suit was maintainable under section 29-A of the Bombay Rent Act which provided that nothing contained in section 28 or 29 should be deemed to bar a party to a suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent Court to establish his title to such premises. The Supreme Court held that a suit which was competent to establish title under section 29-A was a suit to establish title *de hors* the Bombay Rent Act and not a suit which sought to establish title which required

1 (1958) S C J 880 (1959) S C R. 367

2 61 Bom L.R. 1087

to be established under the Rent Act itself. It is obvious that in the suit before the Court of Small Causes, it was open to the tenant to claim protection under the Act and by reason of section 28 no other Court had jurisdiction to try that claim; therefore, the Supreme Court held that section 28 barred the second suit and section 29-A did not save it, because it only saved a suit to establish title *de hors* the Act. The observations made in that decision on which the present appellants rely were these:

"Do the provisions of section 28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant or *vice versa* and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of the provisions? The answer must be in the affirmative on a reasonable interpretation of section 28."

We agree with the High Court that these observations merely show this that in order to decide whether a suit comes within the purview of section 28 what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by section 28. The High Court has rightly said:

"A suit which is essentially one between the landlord and tenant does not cease to be such a suit merely because the defendant denies the claim of the plaintiff. In the same way, a suit which is not between the landlord and tenant and in which judging by the plaint no claim or question arises out of the Rent Act or any of its provisions does not become a suit covered by the provisions of section 28 of the Act as soon as the defendant raises a contention that he is a tenant."

For the reasons given above, we hold that the City Civil Court had jurisdiction to entertain the suit and the High Court correctly came to that conclusion. Therefore, the appeal fails and is dismissed with costs:

Sarkar, J.—I agree that this appeal fails.

The City Civil Court, Bombay held that in view of section 28 of the Bombay Rents Hotels and Lodging Houses Rates Control Act, 1947, it had no jurisdiction to entertain and try the suit which the respondent had filed against the appellants in that Court and directed the plaint to be returned to the respondent for being filed in the proper Court indicated by that section, namely, the Court of Small Causes, Bombay. The City Civil Court had tried the question as a preliminary issue in the suit. There was an appeal to the High Court of Bombay from this decision and the High Court took a contrary view holding that the City Civil Court's jurisdiction to entertain and try the suit had not been taken away by section 28 of the Act. The matter is now before this Court in further appeal.

The suit asked for a declaration that the appellants were not entitled to enter into or remain in possession of a certain shop in Greater Bombay and for a permanent injunction restraining them from entering the shop. The allegations on which the claim to these reliefs was based were that the appellants had been granted a licence to use the shop of which the respondent was the tenant under the owner and that the appellants were wrongfully continuing there in spite of the termination of the licence and were thereby preventing the respondent from carrying on its business in the shop. The suit, therefore, was by a licensor against a licensee for certain reliefs based on the termination of the licence.

The defence of the appellants to this suit was that the relationship between the parties was not that of licensor and licensee but that the shop had in fact been sub-let to the first appellant and that the agreement between the parties had been given the form of a licence only as a cloak to protect the respondent from ejection under the Act by its landlord on the ground of unlawful sub-letting. The appellants contended that as they were really tenants, their landlord, the respondent, was not entitled to remove them from possession in view of the provisions of the Act.

The question is, how far the suit is affected by section 28 of the Act I proceed now to set out the terms of that section omitting the unnecessary portions

Section 28 (1)—"Notwithstanding anything contained in any law

(a) in Greater Bombay, the Court of Small Causes, Bombay

shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and no other Court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question

The section deals with three different kinds of matters, namely, (1) suits or proceedings between a landlord and a tenant relating to the recovery of rent or recovery of possession of premises, (2) an application made under the Act, and (3) a claim or question arising out of the Act or any of its provisions. It provides that no Court except the Court of Small Causes, so far as properties in Greater Bombay are concerned, shall have jurisdiction to entertain and try any suit or proceedings or to decide any application or lastly to deal with any claim or question of any of the said three kinds mentioned in it.

I think it is fairly clear that the suit of the respondent does not fall within the first two kinds of matters contemplated by the section mentioned in the preceding paragraph and I did not understand learned Counsel for the appellants to contend to the contrary. The suit obviously does not come within the second kind for that consists of applications under the Act only and a suit is, of course, not an "application". Turning now to the first kind, it has to be observed that it deals with two varieties of suits between landlord and tenant, namely, a suit for rent and a suit for possession of premises. Obviously the respondent's suit is not a suit for rent for no rent is claimed at all. Nor do I think it possible to say that the suit is one between a landlord and a tenant for recovery of possession of premises. I suppose whether a suit is of this kind or not will have to be decided by the frame of the suit, that is by reference to the plaint for the suit is by the plaintiff and it must be as he has decided it shall be. Admittedly the plaint that the respondent filed does not show that the suit filed by it is between landlord and tenant nor does it contain any claim for recovery of possession of premises.

That brings me to the third class of matters mentioned in the section namely, claims and questions arising out of the Act. The section provides that no Court other than a Court of Small Causes shall have jurisdiction to deal with any claim or question arising under the Act concerning properties in Greater Bombay. It is important to note here that this part of the section does not purport to affect any Court's jurisdiction to entertain and try a suit but it only prevents a Court from dealing with certain claims or questions. Therefore, a Court may try a suit in so far as it does not thereby have to deal with a claim or question arising out of the Act. If the other claims and questions arising in the suit cannot be tried without dealing with a claim or question arising out of the Act, then of course, the practical result would be to prevent the Court from trying the suit at all.

Therefore, it seems to me that the real question in this case is whether the City Civil Court had no jurisdiction to try the respondent's suit as a whole or in part because it would thereby be dealing with a claim or question arising under the Act. Does the decision of the suit then require any claim or question arising out of the Act to be dealt with? If it does not, the City Civil Court would be absolutely free to try the suit.

Now, if one considers the plaint only, then of course it is clear that the present suit raises no claim or question arising out of the Act. But it is said by the appellants that the defence raises such a claim or question. The respondent answers that the section contemplates claims or questions raised by the plaint only, for the section determines the jurisdiction of a Court to entertain and try a suit and this must be done when the suit is instituted and, therefore, it is irrelevant to consider what questions the defence raises.

I think it unnecessary to decide the dispute whether it is permissible under the section to look at the defence for ascertaining whether a claim or question under the Act arises in the suit. As at present advised, I do not want to be understood as assenting to the proposition that a reference to the written statement is not at all permissible for deciding whether a Court has jurisdiction under the section to deal with claims or questions of a certain kind. It is important to remember that the question now is whether a Court has jurisdiction to deal with a claim or question and not whether a Court has jurisdiction to entertain a suit.

I think it unnecessary to decide the dispute because in my view even the defence in the present case does not raise any claim or question under the Act. The defence really is that the appellants are not licensees. No doubt the appellants have gone on to say that they are sub-tenants but they say that only to show why they are not licensees; apart from that it is irrelevant to enquire whether they are sub-tenants or not. I think the defence is only one of a traverse; it is that the appellants are not licensees as the plaint alleges. That being so, the only question that the suit involves is whether the appellants are licensees of the shop. If they are not licensees, then the suit must fail. No other question would fall for decision. Quite clearly, a question whether a defendant is a licensee or not, is not a question nor is it a claim arising out of the Act.

Assume however that the defence by contending that the appellants are not licensees as they are sub-tenants, also raises the question whether the appellants are sub-tenants. Even so, it does not seem to me that is a question or claim arising out of the Act. The Act does not create any tenancy. That has to be created by a contract. The question whether the appellants are sub-tenants, that is to say, tenants of a certain kind, is really a question whether a contract of tenancy was made between the appellants and the respondent. That question is not one arising out of the Act for the Act says nothing as to the creation of a tenancy and is only concerned with the regulation of the relations between a landlord and tenant in a tenancy the existence of which is otherwise brought about.

The appellants no doubt say that the respondent cannot evict them because they are tenants whose right to possession is protected by the Act. They say that, therefore, a question arises whether they are entitled to remain in possession as sub-tenants by virtue of the provisions of the Act and without the decision of that question the respondent's suit cannot be decided. I am entirely unable to see that such a question arises in the suit or that it cannot be decided without a decision of that question. As soon as it is held that the appellants are licensees, the suit has to be decreed. When it is so held it has also been necessarily held that the appellants are not tenants, and, therefore, no further question as to rights of tenants under the Act falls to be decided. If however it is held that the appellants are not licensees but tenants, then on that ground alone the suit has to be dismissed for the claim is not based on any ground other than that the appellants are licensees whose licence has expired. It would not in such an eventuality be necessary further to consider whether the appellants who have been found to be tenants, are entitled to protection from eviction under the Act for the suit involves no claim whatever for ejectment of the appellants considered as tenants. No question, therefore, can possibly arise in the suit as to whether the appellants are

entitled to be in possession as tenants by virtue of rights created by the Act. Looking at the matter from whatever point of view I do, I am wholly unable to think that the decision of any question or claim arising out of the Act is necessary for deciding the suit.

Learned Counsel for the appellants referred to *Babulal Bharamal and another v Nandram Shivram and others*¹ in support of the proposition that the claim or question arising out of the Act mentioned in the section may be one where only the defence gives rise to it. I find it wholly unnecessary to discuss whether this case supports that proposition for, as I have said, in the case in hand, even the defence of the appellants does not raise any such claim or question.

I think it right before concluding to refer to section 51 of the Act under which reference to suits and proceedings in the Act are to include reference to proceedings under Chapter VII of the Presidency Small Causes Court Act contemplates proceedings for the recovery of possession of premises from licensees after the termination of licences in certain cases. Whether the present case is of that type or not is not known. If it is of that type, then it may be that the City Civil Court would have no jurisdiction to deal with it and only the Court of Small Causes would have jurisdiction, to do so in view of section 28. As however no argument was advanced by Counsel for the appellants on the basis of section 51 nor the facts necessary for its application appear on the record, I do not feel called upon to express any opinion on the matter. I only draw attention to it to show that if the question does arise that has not been argued nor decided in this case. I think it also right to point out that it may be a moot question whether the appellants, having on their own statement entered into an agreement to defraud in a manner of speaking, the superior landlord of his rights arising under the Act from an unlawful sub-letting, can be permitted to say that the real transaction between them and the respondent was a sub-tenancy.

For these reasons I concur in the order proposed by my brother Das J.

V S

Appeal dismissed

THE SUPREME COURT OF INDIA

• (Civil Appellate Jurisdiction)

PRESENT —B P SENHA, *Chief Justice*, J C SHAH AND N RAJAGOPALA AYYAN GAR, JJ

Mrs Chandnee Widya Vati Madden

*Appellant**

v

Dr C L Katial and others

Respondents

Specific performance—Agreement to sell house property in New Delhi the vendor undertaking to obtain the permission of the Chief Commissioner to the transaction—Contract if contingent and incapable of Specific performance—Vendor withheld during his application to Chief Commissioner for permission—Effect

An agreement to sell house property in New Delhi (ba it on lease hold plot belonging to Government) provided that the vendor shall obtain the necessary permission of the Chief Commissioner to the transaction. Though the vendor had made an application to the appropriate authorities she withdrew the application. The vendor failed to fulfil her part of the agreement though called upon to do so several times by the vendees. In a suit for specific performance or in the alternative for damages.

Held It cannot be said that the contract is of a contingent nature and the contingency not having been fulfilled the contract is not enforceable. The Court has got to enforce the terms of the contract and to enjoin upon the vendor to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary permission. In the event of sanction being refused the vendees will be entitled to the damages.

(I) (1958) S C J 880 (1959) S C R 367

* C.A. No 559 of 1962

25th March 1963

Appeal from the Judgment and Decree, dated 21st March 1961 of the Punjab High Court (Circuit Bench) at Delhi in Regular First Appeals Nos. 8-D and 21-D of 1960.

A. Ranganadham Chetty, Senior Advocate (*S. K. Mehta* and *K. L. Mehta*, Advocates, with him), for Appellant.

M. C. Setalvad, Senior Advocate, (*Hardayal Hardy* and *S. N. Anand*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Sinha, C.J.—This appeal on a certificate granted by the High Court of Punjab arises out of a suit for specific performance of a contract of sale in respect of a house property situate in Tughlak Road, New Delhi, belonging to the appellant and built on a lease-hold plot granted by the Government in the year 1935, to her predecessor-in-title. It appears that the plaintiffs entered into a contract of sale in respect of the disputed property for the sum of Rs. 1,10,000. The deed of agreement is dated 4th September, 1956. In so far as it is necessary to notice the terms of the document, the agreement provided that the vendor shall obtain the permission of the Chief Commissioner to the transaction of sale within two months of the agreement, and if the said permission was not forthcoming within that time, it was open to the purchasers to extend the date or to treat the agreement as cancelled. As the necessary permission was not forthcoming within the stipulated time, the purchasers extended the time by another month. The appellant had made an application to the proper authorities for the necessary permission, but withdrew her application to the Chief Commissioner by her letter dated 12th April, 1957. The plaintiffs called upon the defendant several times to fulfil her part of the agreement but she failed to do so. It was averred on behalf of the plaintiffs that they had always been ready and willing to perform their part of the contract and that it was the defendant who had backed out of it. Hence, the suit for specific performance of the contract for sale or in the alternative for damages amounting to Rs. 51,100. The suit was contested on a large number of grounds of which it is necessary now to take notice only of the plea on which Issue No. 8 was joined. Issue No. 8 is as follows :

“(8) Is the contract contingent or impossible of performance and is uncertain and vague and is therefore void ? ”

The other material issues were concurrently decided in favour of the plaintiffs, and, therefore, need not be referred to.

The trial Court in a very elaborate judgment dismissed the suit for specific performance of contract and for a permanent injunction and decreed the sum of Rs. 11,550 by way of damages, with proportionate costs, against the defendant. Though the Court found that the plaintiffs had been throughout ready and willing, indeed anxious, to perform their part of the contract, and that it was the defendant who backed out of it, it refused the main relief of specific performance of the contract on the ground that the agreement was inchoate in view of the fact that the previous sanction of the Chief Commissioner to the proposed transfer had not been obtained.

The High Court on appeal came to the conclusion that the agreement was a completed contract for sale of the house in question, subject to the sanction of the Chief Commissioner before the sale transaction could be concluded, but that the Trial Court was in error in holding that the agreement was inchoate, and that, therefore, no decree for specific performance of the contract could be granted. The High Court relied mainly on the decision of their Lordships of the Judicial Committee of the Privy Council in *Motilal v. Naphelal*¹, for coming to the conclusion that there was a completed contract between the parties and that the condition in the agreement that the vendor would obtain the sanction of the Chief Commissioner to the transaction of sale did not render the contract incomplete. In pursuance of

that term in the agreement, the vendor had to obtain the sanction of the Chief Commissioner and as she had withdrawn her application for the necessary sanction, she was to blame for not having carried out her part of the contract. She had to make an application for the necessary permission. The High Court also pointed out that if the Chief Commissioner ultimately refused to grant the sanction to the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract but that was no bar to the Court passing a decree for that relief. Though it was not necessary in the view the High Court took of the rights of the parties it recorded a finding that a sum of Rs 5 775 would be the appropriate amount of damages in the event of the plaintiffs not succeeding in getting their main relief for specific performance of the contract.

The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.

In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the defendant, within one month from to day, shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. The appellant sought to raise certain other pleas which had not been raised in the High Court, for example, that this was not a fit case in which specific performance of contract should be enforced by the Court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time.

For the reasons given above, the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed

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